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ABSTRACT

This document presents final regulations for the Assistance to States for Education of Children with Disabilities program under Part B of the Individuals with Disabilities Act (IDEA Part B) and the Early Intervention Program for Infants and Toddlers with Disabilities under Part C of the Act. These regulations are needed to implement changes made to Part B by the IDEA Amendments of 1997; to make other changes to the Part B regulations based on relevant, long-standing policy guidance; and to revise the requirements on state complaint procedures under both the Part B and Part C programs. The regulations take effect on May 11, 1999; however, compliance with these regulations will not be required until the date that the state receives FY 1999 funding under the program or on October 1, 1999, whichever is earlier. Changes to the program are explained and include regulations affecting: (1) definitions; (2) state and local eligibility; (3) services; (4) Individualized Education Programs; (5) children in private schools; and (6) discipline for children with disabilities. Comments on the proposed changes and on the outcome of the changes are also included. Appendices include a question and answer section on the new regulations and requirements, and a subject index. (CR)

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Part II

Department of Education

34 CFR Parts 300 and 303

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities; Final Regulations

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DEPARTMENT OF EDUCATION

34 CFR Parts 300 and 303

RIN 1820-AB40

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations for the Assistance to States for Education of Children with Disabilities program under Part B of the Individuals with Disabilities Education Act (IDEA; Part B) and the Early Intervention Program for Infants and Toddlers with Disabilities under Part C of the Act (Part C). These regulations are needed to implement changes made to Part B by the IDEA Amendments of 1997; make other changes to the part B regulations based on relevant, longstanding policy guidance; and revise the requirements on State complaint procedures under both the Part B and Part C programs.

DATES: These regulations take effect on May 11, 1999. However, compliance with these regulations will not be required until the date the State receives FY 1999 funding (expected to be available for obligation to States on July 1, 1999) under the program or October 1, 1999, whichever is earlier. Affected parties do not have to comply with the information collection requirements contained in the regulations listed under the Paperwork Reduction Act of 1995 section of this preamble until the Department publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Thomas Irvin or JoLeta Reynolds (202) 205-5507. Individuals who use a telecommunications device for the deaf (TDD) may call (202) 205-5465.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to Katie Mincey, Director of the Alternate Formats Center. Telephone: (202) 205-8113.

SUPPLEMENTARY INFORMATION: On October 22, 1997, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (62 FR 55026) to amend the regulations governing the Assistance to States for Education of Children with Disabilities program (part 300), the Preschool Grants for Children with Disabilities program (part 301), and the Early Intervention Program for Infants and Toddlers with Disabilities (part 303). A key purpose of the NPRM was to implement changes made by the IDEA Amendments of 1997 (Pub. L. 105-17).

Since that time, the Department has published final regulations for both the Preschool Grants program (63 FR 29928, June 1, 1998) and the Early Intervention program for Infants and Toddlers with Disabilities (63 FR 18297, April 14, 1998), to incorporate the requirements added to those programs by Pub. L. 105-17. On April 14, 1998, a document was published in the **Federal Register** inviting comment on whether the regulations for the Early Intervention program for Infants and Toddlers with Disabilities should be further amended (63 FR 18297). (A subsequent document reopening the comment period was published on August 14, 1998 (63 FR 43866)).

The final regulations in this publication are needed to conform the existing regulations under Part B of the Act to the new statutory requirements added by Pub. L. 105-17, including (1) amending requirements under prior law related to areas such as State and local eligibility, evaluation, and individualized education programs (IEPs), and (2) incorporating new requirements in the Act (e.g., those relating to discipline, performance goals and indicators, participation of children with disabilities in State and district-wide assessments, procedural safeguards notice, and mediation).

The regulations have also been amended to incorporate relevant longstanding interpretations of the Act that have been addressed in nonregulatory guidance in the past and are needed to ensure a more meaningful implementation of the Act and its regulations for children with disabilities, parents, and public agencies. These interpretations are based on the statutory provisions of the IDEA that were in effect prior to the IDEA Amendments of 1997 and that were not changed by those Amendments. Examples of provisions of the regulations that incorporate prior Department interpretations of the statute include:

Section 300.7(c)(9)—recognizing that some children with attention deficit disorder (ADD) may be identified under the category of other health impairment;

Section 300.19—recognizing that foster parents may, under certain circumstances and if permitted under State law, qualify as a "parent";

Section 300.121(c)—recognizing that if a child's third birthday is in the summer, the child's IEP team determines the date when services begin under the child's IEP or IFSP. (The team must develop the IEP or IFSP by the child's third birthday.);

Section 300.122(a)(3)—recognizing that graduation with a regular high school diploma ends the child's eligibility under Part B;

Section 300.309—recognizing that extended school year services must be provided if necessary for the provision of a free appropriate public education to the child; and

Section 300.519—identifying what constitutes a change of placement for disciplinary purposes under these regulations.

In addition, changes have been made to the requirements on State complaint procedures in the regulations for Part B (§§ 300.660-300.662), and conforming changes have been made in the Part C regulations (§§ 303.510-303.512).

Analysis of Comments and Changes

In response to the Secretary's invitation to comment on the NPRM published in the **Federal Register** on October 22, 1997 (62 FR 55026), about 6,000 individuals, public agencies, and organizations submitted written or oral comments. An analysis of the public comments received, including a description of the changes made in the proposed regulations since publication of the NPRM, is published as Attachment 1 to these final regulations. The perspectives of individuals and groups of parents, teachers, related service providers, State and local officials, individuals with disabilities and members of Congress were very important in helping to identify where changes were necessary in the proposed regulations, and in formulating many of those changes. The detailed, thoughtful comments of so many individuals and organizations clearly demonstrated a high level of commitment to making sure that the IDEA and its regulations make a real difference in the day-to-day education of our children. In light of the comments received, a number of significant changes are reflected in these final regulations.

Effective Date of These Regulations

These regulations take effect on May 11, 1999. As these regulations were not in effect at the time Federal fiscal year

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(FY) 1998 funds (funds for use during school year 1998–99) became available for obligation to States, compliance with the requirements of these regulations, that are not statutory requirements or provisions of pre-existing regulations, will not be mandatory for this grant year. When either the FY 1998 funds that are unobligated by States and school districts become carryover funds (October 1, 1999) or, if earlier, the State receives FY 1999 funding (expected to be available for obligation to States July 1, 1999) compliance with these final regulations is required. This will enable all parties to become familiar with the new regulations without requiring changes that could interrupt school or program operations in the middle of a grant year. However, States and school districts may adopt and use these regulations when they are effective, and are encouraged, to the greatest extent possible, to start to implement them as soon as possible during this school year. In any case, the statutory requirements of the Individuals with Disabilities Education Act Amendments of 1997 (IDEA Amendments of 1997) are in effect and must be complied with throughout the 1998–99 school year. In addition, States and school districts must comply with all requirements of the Part 300 regulations that were in effect at the beginning of this school year unless inconsistent with the IDEA Amendments of 1997 or these final regulations. Applications for grants for FY 1999 funds must be consistent with the requirements of these final regulations.

Most of the provisions of the IDEA Amendments of 1997 relating to Parts B and C of the Act have been in effect since enactment, June 4, 1997, with a few provisions, such as the new Part B provisions concerning individualized education programs and the comprehensive system of personnel development, taking effect on July 1, 1998. Therefore, States and school districts already are familiar with the statutory provisions of the IDEA Amendments of 1997 to which they must comply.

Major Changes in the Regulations

The following is a summary of the major substantive changes from the NPRM in these final regulations:

1. General Changes

- All notes in the NPRM related to the sections or subparts covered in these final regulations have been removed. The substance of any note that should be required for proper implementation of the Act has been added to the text of these final regulations. Information in notes considered to be directly relevant to the "Notice of Interpretation" on IEP requirements has been added to the text of that notice in Appendix A to these final regulations. The substance of any note considered to provide clarifying information or useful guidance has been incorporated into the discussion of the applicable comments in the "Analysis of Comments and Changes" (see Attachment 1 to these final regulations). All other notes have been deleted.
- Appendix C in the NPRM ("Notice of Interpretation on IEPs) has been redesignated as "Appendix A" in these final regulations; and a new Appendix B—Index to IDEA Part B Regulations has been added.
- Three attachments have also been added: Attachment 1—Analysis of Comments and Changes; Attachment 2—Final Regulatory Flexibility Analysis; and Attachment 3—Table showing "Disposition of NPRM Notes in Final Part 300 and 303 Regulations." However, these attachments will not be codified in the Code of Federal Regulations.

2. Changes in Subpart A—General

- Proposed § 300.2 (Applicability of this part to State, local, and private agencies) has been revised to include "public charter schools that are not otherwise included as local educational agencies (LEAs) or educational service agencies (ESAs) and are not a school of an LEA or ESA" and to specify that the rules of Part 300 apply to all public agencies in the State providing special education and related services.
- Consistent with the general decision to not use notes in these final regulations, proposed Note 1 immediately preceding § 300.4 in the NPRM, (which included a list of terms defined in specific subparts and sections of the regulations) has been deleted and the terms included as part of an index to these regulations (see Appendix B).
- The proposed definition of "child with a disability" (§ 300.7(a)) has been revised to clarify that if a child with a disability needs only a related service and not special education, the child is not eligible under this part; but if the related service is considered to be special education under State standards, the child would be eligible.
- The proposed definition of "other health impairment" ("OHI"), at § 300.7(c)(9), has been amended to (1) add "attention deficit disorder" (ADD) and "attention deficit hyperactivity disorder" (ADHD) to the list of conditions that could render a child eligible under OHI, and (2) clarify that, with respect to children with ADD/ADHD, the phrase "limited strength, vitality, or alertness" includes "a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment."
- The proposed definition of "Day" (§ 300.9) has been retitled "Day; business day; school day," and definitions of "business day" and "school day" have been added.
- The proposed definition of "educational service agency" (§ 300.10) has been revised to clarify that the term "[i]ncludes entities that meet the definition of "intermediate educational unit" in section 602(23) of IDEA as in effect prior to June 4, 1997."
- The proposed definition of "general curriculum" in § 300.12 of the NPRM and the explanatory note following that section have been deleted. The term is explained where it is used in § 300.347 and in Appendix A regarding IEP requirements.
- The proposed definition of "local educational agency" (§ 300.18) has been amended to clarify, consistent with new statutory language concerning public charter schools, that the term includes public charter schools that are established as an LEA under State law.
- The proposed definition of "native language" (§ 300.19) has been amended to specify that (1) in all direct contact with a child (including evaluation of the child), the native language is the language normally used by the child in the home or learning environment, and (2) for an individual with deafness or blindness, or with no written language, the mode of communication is that normally used by the individual (such as sign language, braille, or oral communication).
- The proposed definition of "parent" has been amended to (1) add language clarifying that the term means a natural or adoptive parent of a child and a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare), and (2) permit States in certain circumstances to use foster parents as parents under the Act unless prohibited by State law.
- The proposed definition of "public agency" (§ 300.22) has been amended to add to the list of examples of a public agency "public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA", consistent with new statutory language concerning public charter schools.
- The proposed definition of "parent counseling and training," under the definition of "related services," (§ 300.24(b)(7)) has been amended to

add that the term also means "helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP."

- The proposed definition of "special education" (§ 300.26) has been amended to add "travel training" as a special education service and to include a definition of the term.

3. Changes in Subpart B—State and Local Eligibility

State Eligibility

- Proposed § 300.110 (Condition of assistance) has been amended to more explicitly state what is required for compliance with the State eligibility requirements.
- Proposed § 300.121 (FAPE) has been amended to specify (1) requirements for providing FAPE for children with disabilities beginning at age 3; (2) that services need not be provided during periods of removal under § 300.520(a)(1) to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabiliities who has been similarly removed; (3) the standards that are used to determine appropriate services for children with disabilities who have been removed from their current placement for more than 10 school days in a school year; (4) that LEAs must ensure that FAPE is available to any child with a disability who needs special education and related services, even though the child is advancing from grade to grade; and (5) that the determination that a child who is advancing from grade to grade is eligible under this part must be made on an individual basis by the group within the LEA responsible for making eligibility determinations.
- Proposed § 300.122 (Exception to FAPE for certain ages) has been amended to (1) specify situations in which the exception to FAPE for students with disabilities in adult prisons does not apply, and (2) make clear that graduation from high school with a regular diploma is a change in placement requiring notice in accordance with § 300.503. (A related change to § 300.534(c) makes clear that a reevaluation is not required for graduation with a regular high school diploma or termination of eligibility for exceeding the age eligibility for FAPE under State law.)
- Proposed § 300.125 (Child find) has been revised to (1) clarify that the child find requirements apply to highly mobile children (e.g., migrant and homeless children), and to children who are suspected of being a child with a disability under this part, even though they are advancing from grade to grade, and (2) add needed clarifications of requirements relating to child find for children from birth through age 2 when the SEA and lead agency for the Part C program are different.
- Proposed § 300.136 (Personnel standards) has been amended as follows:

(1) The proposed definition of "profession or discipline" in § 300.136(a)(3) has been revised to clarify that the term "specific occupational category" is not limited to traditional categories.

(2) The policies and procedures in proposed § 300.136(b) have been expanded to provide that (A) each State may determine the specific occupational categories required in the State and revise or expand them as needed; (B) nothing in these regulations requires a State to establish a specific training standard (e.g., a masters degree); and (C) a State with only one entry-level academic degree for employment of personnel in a specific profession or discipline may modify that standard, as necessary, to ensure the provision of FAPE to all eligible children.

(3) Proposed § 300.136(g) (State policy to address shortage of personnel) has been amended by adding provisions that (A) if a State has reached its established date for a specific profession or discipline, it may still exercise the option in redesignated § 300.136(g)(1); and (B) each State must have a mechanism for serving children with disabilities if instructional needs exceed available (qualified) personnel, including addressing those shortages in its comprehensive system of personnel development if the shortages continue.

- Proposed § 300.138 (Participation in assessments) has been amended to require appropriate modifications in the administration of the assessments, if necessary.
- Proposed § 300.142 (Methods of ensuring services) has been amended as follows:

(1) Proposed § 300.142(b) (Obligation of noneducational public agencies) has been revised to specify that those agencies may not disqualify an eligible service for Medicaid reimbursement because the service is provided in an educational context.

(2) Proposed § 300.142(b)(2) (Reimbursement for services by noneducational public agency) has been revised to require that an LEA must provide services in a timely manner if a public noneducational agency fails to provide or pay for the services.

(3) Proposed § 300.142(e) has been added to make clear that a public agency may use a child's public insurance to provide or pay for services required under Part B, with certain limitations. The public agency (A) may not require parents to sign up for public insurance in order for the child to receive FAPE, (B) may not require parents to incur out-of-pocket expenses in order to file the claim for services under Part B, and (C) may not use the child's benefits under a public insurance program if that use would decrease available lifetime coverage or any other insured benefit, result in the family paying for services that would have been covered by the public insurance and are required for the child outside of the time the child is in school, increase premiums or lead to discontinuation of services or risk loss of eligibility for home and community-based waivers due to aggregate health-related expenditures.

(4) The proposed provisions on children covered by private insurance have been redesignated as § 300.142(f), and revised to provide that a public agency (A) may access a parent's private insurance proceeds only if the parent provides informed consent, and (B) must obtain consent each time it proposes to access those proceeds, and inform the parents that their refusal to permit such access does not relieve the public agency of its responsibility to provide all required services at no cost to the parents.

(5) A new § 300.142(g) has been added to permit the use of part B funds to ensure FAPE for (A) the cost of required services under these regulations if the parents refuse consent to use public or private insurance, and (B) the costs of using the parents' insurance, such as paying deductible or co-pay amounts.

(6) Proposed § 300.142(f) (Proceeds from public or private insurance) has been redesignated as paragraph (h), and revised to clarify that (A) the insurance proceeds received by a public agency do not have to be returned to the Department or dedicated to the part B program; and (B) funds expended by a public agency from reimbursements of Federal funds will not be considered State or local funds for purposes of State or local maintenance of effort.

(7) A new § 300.142(i) has been added to specify that nothing in Part B should be construed to alter the requirements imposed on a State medicaid agency, or any other agency administering a public insurance program by Federal statute, regulations or policy under Title XIX or Title XXI of the Social Security Act, or any other public insurance program.

- Proposed § 300.148 (Public participation) has been amended to clarify that a State will be considered to be in compliance with this section if the State has subjected the policy or procedure to a public participation process that is required by the State for other purposes and is comparable to and consistent with the requirements of §§ 300.280–300.284.
- Proposed § 300.154 (Maintenance of State financial support) has been amended to clarify that maintenance of State financial support can be demonstrated on either a total or per-capita basis.

LEA Eligibility—Specific Conditions

- Proposed § 300.231 (Maintenance of effort) has been amended to set out the standard for meeting the maintenance of effort requirement.
- Proposed § 300.232 (Exception to maintenance of effort) has been amended to specify that the exception related to voluntary retirement or resignation of personnel must be in full conformity with existing school board policies, any applicable collective bargaining agreement, and applicable State statutes.
- Proposed § 300.234 (Schoolwide programs under title I of the ESEA) has been amended to make clear that an LEA that uses Part B funds in schoolwide program schools must ensure that children with disabilities in those schools receive services in accordance with a properly developed IEP and are afforded all applicable rights and services guaranteed under the IDEA.

4. Changes in Subpart C—Services

Free Appropriate Public Education

- Proposed § 300.300 (Provision of FAPE) has been amended to specify that the State must ensure that the child find requirements of § 300.125 are implemented by public agencies throughout the State. Proposed § 300.300 also has been amended to specify that (1) the services provided to the child under this part address all of the child's identified special education and related services needs, and (2) are based on the child's identified needs and not the child's disability category.
- Proposed § 300.301 (FAPE—methods and payments) has been amended to add a provision requiring that the State must ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for the special education and related services to the child is being determined.
- Proposed § 300.308 (Assistive technology) has been amended to clarify that, on a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs access to those devices in order to receive FAPE.
- Proposed § 300.309 (Extended school year (ESY) services) has been amended to specify that (1) ESY services must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child, and (2) an LEA may not limit ESY services to particular categories of disability, or unilaterally limit the type, amount, or duration of those services.
- A new § 300.312 (Children with disabilities in public charter schools) has been added to (1) specify that these children and their parents retain all rights under these regulations, and that compliance with part B is required regardless of whether a public charter school receives Part B funds; and (2) address the responsibilities of the following: public charter schools that are LEAs; LEAs if the charter school is a school in the LEA; and the SEA if the charter school is not an LEA or a school of an LEA.
- A new § 300.313 (Children experiencing developmental delays) has been added to (1) clarify the circumstances under which the designation "developmental delay" may be used by a State or an LEA in the State; (2) permit a State or LEA that elects to use that term to also use one or more of the disability categories described in § 300.7 for any child aged 3 through 9 who has been determined to have a disability and who, by reason thereof, needs special education; and (3) permit a State to adopt a common definition of developmental delay under Parts B and C of the Act.

Individualized Education Programs (IEPs)

- Proposed § 300.341 (retitled "Responsibility of SEA and other public agencies for IEPs) has been revised to (1) consistent with provisions regarding parentally-placed children with disabilities in religious or other private schools (see changes to Subpart D), and (2) to clarify that the section also applies to the SEA if it provides direct services to children with disabilities as well as other public agencies that provide special education either directly, by contract, or through other means.
- Proposed § 300.342(b) has been revised to provide that the child's IEP must be accessible to each of the child's teachers and service providers and that teacher and service provider with responsibility for its implementation be informed of his or her specific responsibilities under the IEP and of the specific accommodations, modifications, and supports that must be provided for the child under that IEP.
- Proposed § 300.342(d) has been revised to state that all IEPs developed, reviewed, or revised on or after July 1, 1998 must meet the requirements of §§ 300.340–300.350.
- Proposed § 300.343 (IEP meetings) has been revised to clarify that special education and related services must be available to the child within a reasonable period of time following receipt of parent consent to an initial evaluation.
- Proposed § 300.344 (IEP Team) has been amended to (1) clarify that the determination of knowledge or special expertise of "other individuals" under § 300.344(a)(6) is made by the party who has invited the individual to be a member of the IEP team; and (2) permit a public agency to designate another public agency member of the IEP team to also serve as the agency representative, if the criteria in § 300.344(a)(4) are satisfied.
- Proposed § 300.345 (Parent participation) has been revised to clarify that (1) the public agency's notice to parents about the IEP meeting must inform them about the ability of either party to invite individuals with knowledge or special expertise to the meeting, consistent with § 300.344(a)(6) and (c); and (2) the agency must give the parents a copy of their child's IEP.
- Proposed § 300.346 (Development, review, and revision of IEP) has been revised to clarify that, in developing each child's IEP, the IEP team also must consider "as appropriate, the results of the child's performance on any general State or district-wide assessment programs.
- Proposed § 300.347 (Content of IEP) has been amended to (1) clarify that "general curriculum" is the same curriculum as for nondisabled children, and (2) delete the requirement that, if the IEP team determines that services are not needed in one or more of the areas specified in the definition of transition services (§ 300.29), the IEP must include a statement to that effect and the basis upon which the determination was made.
- Proposed § 300.350 (Children with disabilities in religiously-affiliated or other private schools) has been deleted. A new § 300.455(c) has been added to specify LEA responsibilities regarding the development of "services plans" for private school children.

- Proposed § 300.351 (IEP—accountability) has been redesignated as § 300.350, and revised to provide that (1) each public agency must make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP; (2) a State or public agency is not prohibited from establishing its own accountability systems regarding teacher, school, or agency performance; and (3) "[n]othing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that efforts required in paragraph (a) of this section are not being met."

Direct Services by SEA

- Proposed § 300.360 (Use of LEA allocation for direct services) has been amended to clarify that (1) if an LEA does not elect to apply for its Part B funds, the SEA must use those funds to ensure that FAPE is available to all eligible children residing in the jurisdiction of the LEA; (2) if the local allotment is not sufficient to ensure FAPE to all eligible children within the LEA, the SEA must ensure that FAPE is available to those children; and (3) the SEA may use whatever funding sources are available in the State to ensure that all eligible children within each LEA receive FAPE (see § 300.301).
- Proposed § 300.370 (Use of SEA allocations) has been amended to clarify that, of the Part B funds it retains for other than administration, the SEA may use the funds either directly, or distribute them to LEAs on a competitive, targeted, or formula basis.

5. Changes in Subpart D—Children in Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

- Proposed § 300.401 ("Responsibility of SEA") has been revised to provide that a child with a disability placed by a public agency as the means of providing FAPE to the child must receive an education that meets the standards that apply to the SEA and LEA.

Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue

- Proposed § 300.403 ("Placement of children by parent if FAPE is at issue") has been revised to clarify that (1) the provisions of §§ 300.450–300.462 apply to children with disabilities placed voluntarily in private schools, even though the public agency made FAPE available to those children; (2) private school placement by the parents must be appropriate (as determined by a court or hearing officer) in order to be eligible for reimbursement, (3) a parental placement does not need to meet State standards that apply to education provided by the SEA and LEAs in order to be appropriate; and (4) the reimbursement provisions of § 300.403 also apply if parents of a child with a disability who previously received special education and related services under the authority of a public agency enroll the child in a private preschool program.

Children With Disabilities Enrolled by Their Parents in Private Schools

- Proposed § 300.451 ("Child find for private school children with disabilities") has been revised to specify that (1) child find activities for those children must be comparable to child find activities for children with disabilities in public schools, and (2) LEAs must consult with representatives of parentally-placed private school students with disabilities on how to conduct child find activities for that population in a manner that is comparable to those activities for public school children.
- Proposed § 300.452 (retitled "Provision of services—basic requirement") has been amended to add a new provision related to the SEA's responsibility for ensuring that a services plan is developed for each private school child with a disability who has been designated to receive services under these regulations.
- Proposed § 300.453 ("Expenditures") has been revised to specify that (1) each LEA must consult with representatives of private school children with disabilities to decide how to conduct the annual count of the number of those children; (2) the LEA must ensure that the count is conducted by specified dates, and that the data are used to determine the amount of Part B funds to be earmarked for private school children in the next fiscal year; (3) the costs of child find activities for private school children with disabilities may not be considered in determining whether the LEA met the expenditures requirement of this section; and (4) SEAs and LEAs are not prohibited from providing services to private school children with disabilities beyond those required by this part, consistent with State law or local policy.
- Proposed § 300.454 (Services determined) has been revised to specify that each LEA must (1) consult with private school representatives on where services will be provided; (2) conduct meetings to develop, review, and revise a "services plan," in accordance with § 300.455, for each private school child with a disability who has been designated to receive services under this part; and (3) ensure that a representative of the private school participates in the meetings.
- Proposed § 300.455 (Services provided) has been revised to specify that (1) each private school child with a disability who has been designated to receive Part B services must have a services plan, and (2) the plan must, to the extent appropriate, meet the requirements of § 300.347 with respect to the services provided, and be developed, reviewed and revised consistent with §§ 300.342-300.346.
- Proposed § 300.456 (Location of services) has been revised to make clear that, while transportation might be provided between a child's home or private school and a service site if necessary for the child to benefit from or participate in the services offered, LEAs are not required to provide transportation between the child's home and private school.
- Proposed § 300.457 (Complaints) has been revised to specify that the due process procedures under this part apply to child find activities for private school children with disabilities, including evaluations.

6. Changes in Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

- Proposed § 300.500 (General responsibility of public agencies; definitions) has been amended as follows:

(1) The proposed definition of "consent" (300.500(b)(1)) has been revised to clarify that a revocation of consent does not have a retroactive effect if the action consented to has already occurred.

(2) The proposed definition of "evaluation" (§ 300.500(b)(2)) has been revised by deleting the last sentence of the definition, to ensure that evaluations may include a review of a child's performance on a test or procedures used for all children in a school, grade, or class.

- Proposed § 300.501 (Opportunity to examine records; parent participation in meetings) has been amended to (1) delete the word "all" from § 300.501(a)(2); (2) delete the definition of "meetings" but provide that the term does not include certain conversations or preparation for a meeting and (3) clarify that each public agency must "make reasonable efforts" related to parental participation in group discussions relating to the educational placements of their child.

- Proposed § 300.502 (Independent educational evaluation (IEE)) has been amended to (1) add that, upon request for an IEE, parents must be given information about agency criteria applicable for IEEs; (2) clarify, in § 300.502(e)(1), that the criteria under which an IEE is obtained must be the same as that of the public agency "to the extent such criteria are consistent with the parent's right to an IEE," and (3) explain that an explanation of parent disagreement with an agency evaluation may not be required and the public agency may not delay either providing the IEE at public expense or, alternatively, initiating a due process hearing.
- Proposed § 300.503 (Prior notice by the public agency; content of notice) has been amended to delete the provision in § 300.503(b)(8) (related to informing parents about the State complaint procedures). (See § 300.504(b).)
- Proposed § 300.504 (Procedural safeguards notice) has been amended to add State complaint procedures under §§ 300.660-300.662 to the items included in the notice.
- Proposed § 300.505 (Parental consent) has been amended to (1) refer to "informed parent consent;" (2) add "all reevaluations" to the list of actions requiring consent (see § 300.505(a)(1)(i)); (3) delete paragraph (a)(1)(iii), and add a new paragraph (a)(3) to specify that parental consent is not required before reviewing existing evaluation data as a part of an evaluation or reevaluation or for administering a test used with all children unless consent is required of all parents; and (4) specify, in paragraph (e), that a public agency may not use a parental refusal to consent to one service or benefit under paragraphs (a) and (d) to deny the parent or child another service or benefit.
- Proposed § 300.506 (Mediation) has been revised to (1) add a new § 300.506(b)(2) to specify that the mediator must be selected from a list of mediators on a random basis (e.g., a rotation), or that both parties are involved in selecting the mediator and agree with the selection of the individual who will mediate; and (2) add a new § 300.506(c)(2) to clarify that payment for mediation services by the State does not make the mediator an employee of the State agency for purposes of impartiality.
- Proposed § 300.507 (Impartial due process hearing; parent notice) has been amended to clarify that, in the content of the parent notice, the description of the nature of the problem applies to the action "refused" as well as that proposed by the public agency.
- Proposed § 300.509 (Hearing rights) has been revised to clarify that, in paragraph (a)(3), the disclosure is required at least 5 "business" days before the hearing.
- Proposed § 300.510 (Finality of decision; impartiality of review) has been amended to (1) make the reference to written findings and decision in § 300.510(b)(2)(vi) consistent with § 300.509(a)(5), and (2) allow the choice of "electronic or written findings of fact and decision."
- Proposed § 300.513 (Attorneys' fees) has been amended to include all of the provisions of section 615(i)(3)(C)-(G) of the Act.
- Proposed § 300.514(c) has been amended to provide that a decision by a State hearing or review officer that is in agreement with the parents constitutes an agreement for purposes of pendency.
- Proposed § 300.515 (Surrogate parents) has been revised to permit employees of nonpublic agencies that have no role in educating a child to serve as surrogate parents.

Discipline Procedures

- A new § 300.519 (Change of placement for disciplinary removals) has been added regarding change of placement in the context of removals under §§ 300.520–300.529.
- Proposed § 300.520 (Authority of school personnel) has been amended as follows:

(1) Proposed § 300.520(a)(1) has been revised to specify that to the extent removal would be applied to children without disabilities, school personnel may order the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days and additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct as long as they do not constitute a change in placement under § 300.519, and to make clear that after a child with a disability has been removed from his or her current placement for more than 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent necessary under § 300.121(d).

(2) Proposed § 300.520(b) has been revised to replace "suspension" with "removal," and to specify that when first removing a child for more than 10 school days in a school year, or commencing a removal that constitutes a change of placement, the LEA must within 10 business days, convene an IEP meeting. If the agency had not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child the purpose of the IEP meeting is to develop an assessment plan. As soon as practicable after completion of the plan, the LEA must then convene an IEP meeting to develop appropriate behavioral interventions to address the child's behavior. If a child already has a behavioral intervention plan, the purpose of the IEP meeting is to review the plan and its implementation.

(3) Proposed § 300.520(c) has been deleted and replaced with a provision that requires that if a child with a disability who has a behavioral intervention plan and has been removed for more than 10 school days in a school year subsequently is subjected to a removal that is not a change of placement, the child's IEP team members shall review the behavioral intervention plan, and meet to modify it or its implementation if one or more team members think modifications are needed.

- Proposed § 300.521(d) has been modified to make clear that the hearing officer determines the appropriateness of the interim alternative educational setting proposed by school personnel who have consulted with the child's special education teacher.
- Proposed § 300.522 (Determination of setting) has been amended to (1) specify that the interim alternative educational setting referred to in § 300.520(a)(2) must be determined by the IEP team; and (2) clarify that the services and modifications to address the child's behavior are designed to prevent the behavior from recurring.
- Proposed § 300.523 (Manifestation determination review) has been amended as follows:

(1) Proposed § 300.523(a) has been revised to (1) specify that the manifestation determination review is done regarding behavior described in §§ 300.520(a)(2) and 300.521, or if a removal is contemplated that constitutes a change of placement under § 300.519; and (2) require that parents be provided notice of procedural safeguards consistent with § 300.504.

(2) Proposed § 300.523(b) (exception to conducting a manifestation determination review) has been removed.

(3) Proposed § 300.523(c) has been redesignated as § 300.523(b) and revised to specify that the manifestation determination review is conducted at a meeting.

(4) Proposed § 300.523(d) and (e) have been redesignated as § 300.523(c) and (d) and revised by adding "and other

qualified personnel" after "IEP team" each time it is used.

(5) Proposed paragraph (f) has been redesignated as paragraph (e) and a new paragraph (f) has been added to clarify that if in the manifestation review deficiencies are identified in the child's IEP or placement or in their implementation, the public agency must act to correct those deficiencies.

- Proposed § 300.524 (Determination that behavior was not a manifestation of disability) has been amended to (1) replace, in paragraph (a), the reference to "section 612 of the Act" with "§ 300.121(c);" and (2) refer, in paragraph (c), to the placement rules of § 300.526.
- Proposed § 300.525 (Parent appeal) has been revised to refer to any decision regarding placement under §§ 300.520-300.528.
- Proposed § 300.526(c)(3) has been revised to clarify that extensions of 45 day removals by a hearing officer because returning the child to the child's current placement would be dangerous, may be repeated, if necessary.
- Proposed § 300.527 (Protections for children not yet eligible for special education and related services) has been amended as follows:

(1) Proposed § 300.527(b)(1) has been revised to refer to not knowing how to write rather than illiteracy in English.

(2) Proposed § 300.527(b)(2) has been revised to clarify that the behavior or performance is in relation to the categories of disability identified in § 300.7.

(3) Proposed § 300.527(b)(4) has been revised to refer to other personnel who have responsibilities for child find or special education referrals in the agency.

(4) Proposed § 300.527(c) has been redesignated as paragraph (d), and a new paragraph (c) has been added to provide that if an agency acts on one of the bases identified in paragraph (b), determines that the child is not eligible, and provides proper notice to the parents, and there are no additional bases of knowledge under paragraph (b) that were not considered, the agency would not be held to have a basis of knowledge under § 300.527(b).

(5) Proposed § 300.527(d)(2)(ii) has been revised to clarify that an educational placement under that provision can include suspension or expulsion without educational services.

- Proposed § 300.528 (Expedited due process hearings) has been amended as follows:

(1) Proposed § 300.528(a)(1) (requiring a decision within 10 business days) has been deleted. (Paragraphs (a)(2) and (a)(3) are redesignated as (a)(1) and (a)(2) and paragraphs (b) and (c) are redesignated as (c) and (d).)

(2) A new § 300.528(b) has been added to require that (A) each State establish a timeline for expedited due process hearings that results in a written decision being mailed to the parties within 45 days, with no extensions permitted that result in decisions being issued more than 45 days after the hearing request is received by the public agency; and (B) decisions be issued in the same period of time, whether the hearing is requested by a parent or an agency.

(3) Redesignated § 300.528(d) has been revised to specify that expedited due process hearings are appealable consistent with the § 300.510.

- Proposed § 300.529 (Referral to and action by law enforcement and judicial authorities) has been amended to make clear that copies of a child's special education and disciplinary records may be transmitted only to the extent that such transmission is permitted under FERPA. (Section 300.571 has been amended to note the relationship of this section.)

Procedures for Evaluation and Determination of Eligibility

- Proposed § 300.532 (Evaluation procedures) has been amended to (1) require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not, instead, measure the child's English language skills (§ 300.532(a)2); (2) provide that the information gathered include information related to enabling the child to be involved and progress in the general curriculum or appropriate activities if the child is a preschool child (§ 300.532(b)); (3) provide that if an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, must be included in the evaluation report (§ 300.532(c)(2)); and (4) provide that each public agency ensure that the evaluation of each child with a disability under §§ 300.531-300.536 is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
- Proposed § 300.533 (Determination of needed evaluation data) has been revised to clarify that the group reviewing existing data may conduct that review without a meeting (§ 300.533(b)).
- Proposed § 300.534 (Determination of eligibility) has been amended to clarify that (1) children are not eligible if they need specialized instruction because of limited English proficiency or lack of instruction in reading or math, but do not need such instruction because of a disability, as defined in § 300.7; and (2) the evaluation required in § 300.534(c)(1) is not required before termination of a child's eligibility under Part B of the Act due to graduation with a regular high school diploma, or ceasing to meet the age requirement for FAPE under State law.
- Proposed § 300.535 (Procedures for determining eligibility and placement) has been revised to add "parent input" to the variety of sources from which the public agency will draw in interpreting evaluation data for the purpose of determining a child's eligibility under this part.

Least Restrictive Environment (LRE)

- Proposed § 300.550 (General LRE requirements) has been amended to add a cross reference to § 300.311(b) and (c), to clarify that the LRE provisions do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.
- Proposed § 300.552 (Placements) has been amended to (1) include a reference to preschool children with disabilities in the introductory paragraph of this section, and (2) to add a new § 300.552(e) prohibiting the removal of child with a disability from an age-appropriate regular classroom solely because of needed modifications in the general curriculum.

Confidentiality of Information

- Proposed § 300.562 (Access rights) has been revised to make it clear that expedited due process hearing procedures under §§ 300.521-300.529 are also covered under this section.
- Proposed § 300.571 (Consent) has been amended to permit disclosures without parental consent to the agencies identified in § 300.529, to the extent permitted under the Family Educational Rights and Privacy Act (FERPA).
- Proposed § 300.574 (Children's rights) has been revised by incorporating into the regulations the substance of the two notes following the section (relating to transfer of educational records to the student at age 18).

Department Procedures

- Proposed § 300.589 (Waiver of requirement regarding supplementing and not supplanting with Part B funds) has been revised to conform to the statutory provision that the Secretary provides a waiver "in whole or in part."

7. Changes in Subpart F—State Administration

- Proposed § 300.652 (Advisory panel functions) has been revised to clarify that one of the duties of the advisory panel is advising the State agency that has general responsibility for students who have been convicted as adults and incarcerated in adult prisons.
- Proposed § 300.653 (Advisory panel procedures) has been amended to specify that all advisory panel meetings and agenda items must be "announced enough in advance of the meeting to afford interested parties a reasonable opportunity to attend."
- Proposed § 300.660 (Adoption of State complaint procedures) has been revised to clarify that if an SEA, in resolving a complaint, finds a failure to provide appropriate services to a child with a disability, the SEA must address (1) how to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and (2) appropriate future provision of services for all children with disabilities.
- Proposed § 300.661 (Minimum State complaint procedures) has been revised to clarify that (1) if an issue in a complaint is the subject of a due process hearing, that issue (but not any issue outside of the hearing) would be set aside until the conclusion of the hearing, (2) the decision on an issue in a due process hearing would be binding in a State complaint resolution, and (3) a public agency's failure to implement a due process decision would have to be resolved by the SEA.

8. Changes in Subpart G—Allocation of Funds; Reports

- Proposed § 300.712 (Allocations to LEAs) has been revised to clarify that, if LEAs are created, combined, or otherwise reconfigured subsequent to the base year (i.e. the year prior to the year in which the appropriation under section 611(j) of the Act exceeds $4,924,672,200), the State is required to provide the LEAs involved with revised base allocations calculated on the basis of the relative numbers of children with disabilities aged 3 through 21, or 6 through 21, depending on whether the State serves all children with disabilities aged 3 through 5 currently provided special education by each of the affected LEAs. The section also has been expanded to state that, for the purpose of making grants under this section, States must apply, on a uniform basis across all LEAs, the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.
- Proposed § 300.713 (Former Chapter 1 State agencies) has been revised to clarify that the amount each former Chapter 1 State agency must receive is the minimum amount.
- Proposed § 300.751 (Annual report of children served) has been revised to clarify that the Secretary may permit States to collect certain data through sampling.

9. Changes to Part 303

- Proposed § 303.510 (Adopting State complaint procedures) has been revised to clarify that if a lead agency, in resolving a complaint, finds a failure to provide appropriate services, it must address (1) how to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family, as well as (2) appropriate future provision of services for all infants and toddlers with disabilities and their families.
- Proposed § 303.512 (Minimum State complaint procedures) has been revised to clarify that (1) if an issue in a complaint is the subject of a due process hearing, that issue (but not any issue outside of the hearing) would be set aside until the conclusion of the hearing, (2) the decision on an issue in a due process hearing would be binding in a State complaint resolution, and (3) a public agency's or private service provider's failure to implement a due process decision must be resolved by the lead agency.

Role of the Regular Education Teacher on the IEP Team

The regulations at §§ 300.344(a)(2) and 300.346(d) repeat the statutory provisions regarding the role of the regular education teacher in developing, reviewing, and revising IEPs. The extent of the regular education teacher's involvement in the IEP process would be determined on a case by case basis and is addressed in question 24 in Appendix A.

Discipline for Children With Disabilities

Some Key Changes in the Regulations Regarding Discipline for Children With Disabilities

One of the major areas of concern in public comment on the NPRM was the issue of discipline for children with disabilities under the Act. The previous list of major changes briefly describes the major changes from the NPRM that are reflected in these final regulations regarding discipline under §§ 300.121(d), and 300.519–529. These changes reflect very serious consideration of the concerns of school administrators and teachers regarding preserving school safety and order without unduly burdensome requirements, while helping schools respond appropriately to a child's behavior, promoting the use of appropriate behavioral interventions, and increasing the likelihood of success in school and school completion for some of our most at-risk students.

The comments also revealed some confusion about several of the provisions of the Act and the NPRM regarding discipline. Limitations in the statute and regulations about the amount of time that a child can be removed from his or her current placement only come into play when schools are not able to work out an appropriate placement with the parents of a child who has violated a school code of conduct. In many, many cases involving discipline for children with disabilities, schools and parents are able to reach an agreement about how to respond to the child's behavior. In addition, neither the statute or the proposed or final regulations impose absolute limits on the number of days that a child can be removed from his or her current placement in a school year. As was the case in the past, school personnel have the ability to remove a child for short periods of time as long as the removal does not constitute a change of placement. To help make this point, the regulations include a new provision (§ 300.519) that reflects the Department's longstanding definition of what constitutes a "change of placement" in the disciplinary context. In this regulation, a disciplinary "change of placement" occurs when a child is removed for more than 10 consecutive school days or when the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, *and* because of factors such as the length of the removal, the total amount of time the child is removed, and the proximity of the removals to one another. (§ 300.519). Changes also have been made to § 300.520(a)(1) to make clear that multiple short-term removals (i.e., 10 consecutive days or less) for separate incidents of misconduct are permitted, to the extent removals would be applied to children without disabilities as long as those removals do not constitute a change of placement, as defined in § 300.519.

Instead of requiring that services begin on the eleventh day in a school year that a child is removed from his or her current educational placement, as was proposed in the NPRM, the regulations take a more flexible approach. If the removal is pursuant to school personnel's authority to remove for not more than 10 consecutive days (§ 300.520(a)(1)) or for behavior that is not a manifestation of the child's disability, consistent with § 300.524 services must be provided to the extent necessary to enable the child to continue to appropriately progress in the general curriculum and appropriately advance toward the goals in his or her IEP. (§ 300.121(d)).

If the removal is by school personnel under their authority to remove for not more than 10 school days at a time (§ 300.520(a)(1)), school personnel, in consultation with the child's special education teacher, make the determination regarding the extent to which services are necessary to meet this standard. (§ 300.121(d)(3)(i)). On the other hand, if the removal constitutes a change in placement, the child's IEP team must be involved. If the removal is pursuant to the authority to discipline a child with a disability to the same extent as a nondisabled child for behavior that has been determined to not be a manifestation of the child's disability (§ 300.524), the child's IEP team makes the determination regarding the extent to which services are necessary to meet this standard. (§ 300.121(d)(3)(ii)). If the child is being placed in an interim alternative educational setting for up to 45 days because of certain weapon or drug offenses (§ 300.520(a)(2)) or because a hearing officer has determined that there is a substantial likelihood of injury to the child or others if the child remains in his or her current placement (§ 300.521), the services to be provided to the child are determined based on § 300.522. In these cases, the interim alternative educational setting must be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP and include services and modifications to address the behavior. (§§ 300.121(d)(2)(ii) and 300.522).

Under these regulations, IEP team meetings regarding functional behavioral assessments and behavioral intervention plans will only be required within 10 business days of (1) when the child is first removed for more than 10 school days in a school year, and (2) whenever the child is subjected to a disciplinary change of placement. (§ 300.520(b)(1)). In other subsequent removals in a school year of a child who already has a functional behavioral assessment and behavioral intervention plan, the IEP team members can review the behavioral intervention plan and its implementation in light of the child's behavior, without a meeting, and only meet if one or more of the team members believe that the plan or its implementation need modification. (§ 300.520(c)).

These final regulations also provide that manifestation determinations, and the IEP team meetings to make these determinations, are only required when a child is subjected to a disciplinary change of placement. (§ 300.523(a)). These changes should eliminate the need for unnecessary, repetitive IEP team meetings. The discussion of comments regarding the disciplinary sections of the regulations in Attachment 1 provides a fuller explanation of the regulatory provisions regarding discipline.

Answers to Some Commonly Asked Questions About Discipline Under IDEA

Prior to the amendments to the Education of the Handicapped Act (EHA) in 1975, (the EHA is today known as IDEA), the special educational needs of children with disabilities were not being met. More than half of the children with disabilities in the United States did not receive appropriate educational services, and a million children with disabilities were excluded entirely from the public school system. All too often, school officials used disciplinary measures to exclude children with disabilities from education simply because they were different or more difficult to educate than nondisabled children.

It is against that backdrop that Pub. L. 94–142 was developed, with one of its primary goals being the elimination of any exclusion of children with disabilities from education. In the IDEA reauthorization of 1997, Congress recognized that in certain instances school districts needed increased flexibility to deal with safety issues while maintaining needed due process protections in the IDEA. The following questions and answers address: (1) the proactive requirements of the IDEA designed to ensure that children with disabilities will be able to adhere to school rules; (2) IDEA provisions regarding removal of students from their current placement when their behavior significantly violates school discipline codes; and (3) the requirement of the IDEA for the continuation of services for children with disabilities who are disciplined.

1. Why are there special rules about discipline for children with disabilities?

The protections in the IDEA regarding discipline are designed to prevent the type of often speculative and subjective decision making by school officials that led to widespread abuses of the rights of children with disabilities to an appropriate education in the past. For example, in *Mills* v. *Board of Education of the District of Columbia* (1972) the court recognized that many children were being excluded entirely from education merely because they had been identified as having a behavior disorder. It is important to keep in mind, however, that these protections do not prevent school officials from maintaining a learning environment that is safe and conducive to learning for all children. Well run schools that have good leadership, well-trained teachers and high standards for all students have fewer discipline problems than schools that do not.

It is also extremely important to keep in mind that the provisions of the statute and regulation concerning the amount of time a child with a disability can be removed from his or her regular placement for disciplinary reasons are only called into play if the removal constitutes a change of placement and the parent objects to proposed action by school officials (or objects to a refusal by school officials to take an action) and requests a due process hearing. The discipline rules concerning the amount of time a child can be removed from his or her current placement essentially are exceptions to the generally applicable requirement that a child remains in his or her current placement during the pendency of due process, and subsequent judicial, proceedings. (See, section 615(j) of the Act and § 300.514.) If school officials believe that a child's placement is inappropriate they can work with the child's parent through the IEP and placement processes to come up with an appropriate placement for the child that will meet the needs of the child and result in his or her improved learning and the learning of others and ensure a safe environment. In addition to the other measures discussed in the following questions, the discipline provisions of the IDEA allow responsible and appropriate changes in placement of children with disabilities when their parents do not object.

2. Does IDEA contain provisions that promote proactive up-front measures that will help prevent discipline problems?

Yes. Research has shown that if teachers and other school personnel have the knowledge and expertise to provide appropriate behavioral interventions, future behavior problems can be greatly diminished if not totally avoided. Appropriate staff development activities and improved pre-service training programs at the university level with emphasis in the area of early identification of reading and behavior problems and appropriate interventions can help to ensure that regular and special education teachers and other school personnel have the needed knowledge and skills. Changes in the IDEA emphasize the need of State and local educational agencies to work to ensure that superintendents, principals, teachers and other school personnel are equipped with the knowledge and skills that will enable them to appropriately address behavior problems when they occur.

In addition, the IDEA includes provisions that focus on individual children. If a child has behavior problems that interfere with his or her learning or the learning of others, the IEP team must consider whether strategies, including positive behavioral interventions, strategies, and supports are needed to address the behavior. If the IEP team determines that such services are needed, they must be added to the IEP and must be provided. The Department has supported a number of activities such as training institutes, conferences, clearinghouses and other technical assistance and research activities on this topic to help school personnel appropriately address behavioral concerns for children with disabilities.

3. Can a child with a disability who is experiencing significant disciplinary problems be removed to another placement?

Yes. Even when school personnel are appropriately trained and are proactively addressing children's behavior issues through positive behavioral intervention supports, interventions, and strategies, there may be instances when a child must be removed from his or her current placement. When there is agreement between school personnel and the child's parents regarding a change in placement (as there frequently is), there will be no need to bring into play the discipline provisions of the law. Even if agreement is not possible, in general, school officials can remove any child with a disability from his or her regular school placement for up to 10 school days at a time, even over the parents' objections, whenever discipline is appropriate and is administered consistent with the treatment of nondisabled children. § 300.520(a)(1). However, school officials cannot use this authority to repeatedly remove a child from his or her current placement if that series of removals means the child is removed for more than 10 school days in a school year and factors such as the length of each removal, the total amount of time that the child is removed, and the proximity of the removals to one another lead to the conclusion that there has been a change in placement. §§ 300.519–300.520(a)(1). There is no specific limit on the number of days in a school year that a child with a disability can be removed from his or her current placement. After a child is removed from his or her current placement for more than 10 cumulative school days in a school year, services must be provided to the extent required under § 300.121(d), which concerns the provision of FAPE for children suspended or expelled from school.

If the child's parents do not agree to a change of placement, school authorities can unilaterally remove a child with a disability from the child's regular placement for up to 45 days at a time if the child has brought a weapon to school or to a school function, or knowingly possessed or used illegal drugs or sold or solicited the sale of controlled substances while at school or a school function. § 300.520(a)(2). In addition, if school officials believe that a child with a disability is substantially likely to injure self or others in the child's regular placement, they can ask an impartial hearing officer to order that the child be removed to an interim alternative educational setting for a period of up to 45 days. § 300.521. If at the end of an interim alternative educational placement of up to 45 days, school officials believe that it would be dangerous to return the child to the regular placement because the child would be substantially likely to injure self or others in that placement, they can ask an impartial hearing officer to order that the child remain in an interim alternative educational setting for an additional 45 days. § 300.526(c). If necessary, school officials can also request subsequent extensions of these interim alternative educational settings for up to 45 days at a time if school officials continue to believe that the child would be substantially likely to injure self or others if returned to his or her regular placement. § 300.526(c)(4).

Additionally, at any time, school officials may seek to obtain a court order to remove a child with a disability from school or to change a child's current educational placement if they believe that maintaining the child in the current educational placement is substantially likely to result in injury to the child or others.

Finally, school officials can report crimes committed by children with disabilities to appropriate law enforcement authorities to the same extent as they do for crimes committed by nondisabled students. § 300.529.

4. Do the IDEA regulations mean that a child with a disability cannot be removed from his or her current placement for more than ten school days in a school year?

No. School authorities may unilaterally suspend a child with a disability from the child's regular placement for not more than 10 school days at a time for any violation of school rules if nondisabled children would be subjected to removal for the same offense. They also may implement additional suspensions of up to ten school days at a time in that same school year for separate incidents of misconduct if educational services are provided for the remainder of the removals, to the extent required under § 300.121(d). (See the next question regarding the provision of educational services during periods of removal.) However, school authorities may not remove a child in a series of short-term suspensions (up to 10 school days at a time), if these suspensions constitute a pattern that is a change of placement because the removals cumulate to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. But not all series of removals that cumulate to more than 10 school days in a school year would constitute a pattern under § 300.519(b).

Of course, in the case of less serious infractions, schools can address the misconduct through appropriate instructional and/or related services, including conflict management, behavior management strategies, and measures such as study carrels, time-outs, and restrictions in privileges, so long as they are not inconsistent with the child's IEP. If a child's IEP or behavior intervention plan addresses a particular behavior, it generally would be inappropriate to utilize some other response, such as suspension, to that behavior.

5. What must a school district do when removing a child with a disability from his or her current placement for the eleventh cumulative day in a school year?

Beginning on the eleventh cumulative day in a school year that a child with a disability is removed from his or her current placement, the school district must provide those services that school personnel (for example, the school administrator or other appropriate school personnel) in consultation with the child's special education teacher determine to be necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP. School personnel would determine where those services would be provided. This means that for the remainder of the removal that includes the eleventh day, and for any subsequent removals, services must be provided to the extent determined necessary, while the removal continues. § 300.121(d)(2) and (3).

Not later than 10 business days after removing a child with a disability for more than 10 school days in a school year, the school district must convene an IEP team meeting to develop a behavioral assessment plan if the district has not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child. If a child with a disability who is being removed for the eleventh cumulative school day in a school year already has a behavioral intervention plan, the school district must convene the IEP team (either before or not later than 10 business days after first removing the child for more than 10 school days in a school year) to review the plan and its implementation, and modify the plan and its implementation as necessary to address the behavior. § 300.520(b).

A manifestation determination would not be required unless the removal that includes the eleventh cumulative school day of removal in a school year is a change of placement. § 300.523(a).

6. Does the IDEA or its regulations mean that a child with a disability can never be suspended for more than 10 school days at a time or expelled for behavior that is not a manifestation of his or her disability?

No. If the IEP team concludes that the child's behavior was not a manifestation of the child's disability, the child can be disciplined in the same manner as nondisabled children, except that appropriate educational services must be provided. § 300.524(a). This means that if nondisabled children are long-term suspended or expelled for a particular violation of school rules, the child with disabilities may also be long-term suspended or expelled. Educational services must be provided to the extent the child's IEP team determines necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward the goals set out in the child's IEP. § 300.121(d)(2).

7. Does the statutory language "carries a weapon to school or to a school function" cover instances in which the child acquires a weapon at school?

Yes. Although the statutory language "carries a weapon to school or to a school function" could be viewed as ambiguous on this point, in light of the clear intent of Congress in the Act to expand the authority of school personnel to immediately address school weapons offenses, the Department's opinion is that this language also covers instances in which the child is found to have a weapon that he or she obtained while at school.

Goals 2000: Educate America Act

The Goals 2000: Educate America Act (Goals 2000) focuses the Nation's education reform efforts on the eight National Education Goals and provides a framework for meeting them. Goals 2000 promotes new partnerships to strengthen schools and expands the Department's capacities for helping communities to exchange ideas and obtain information needed to achieve the goals.

These final regulations address the following National Education Goals:

- All children in America will start school ready to learn.
- The high school graduation rate will increase to at least 90 percent.
- All students will leave grades 4, 8, and 12 having demonstrated competency in challenging subject matter, including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation's modern economy.
- United States students will be first in the world in mathematics and science achievement.
- Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.
- Every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning.
- The Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century.
- Every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children.

Executive Order 12866

This is a significant regulatory action under section 3(f)(1) of Executive Order 12866 and, therefore, these final regulations have been reviewed by the Office of Management and Budget in accordance with that order. Because it has been determined that these regulations are economically significant under the order, the Department has conducted an economic analysis, which is provided in Attachment 2. This regulation has also been determined to be a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996.

These final regulations implement changes made to the Individuals with Disabilities Education Act by the IDEA Amendments of 1997 and make other changes determined by the Secretary as necessary for administering this program effectively and efficiently.

The IDEA Amendments of 1997 made a number of significant changes to the law. While retaining the basic rights and protections that have been in the law since 1975, the amendments strengthened the focus of the law on improving results for children with disabilities. The amendments accomplished this through changes that promote the early identification of, and provision of services to, children with disabilities, the development of individualized education programs that enhance the participation of children with disabilities in the general curriculum, the education of children with disabilities with nondisabled children, higher expectations for children with disabilities and accountability for their educational results, the involvement of parents in their children's education, and reducing unnecessary paperwork and other burdens to better direct resources to improved teaching and learning.

All of these objectives are reflected in these final regulations, which largely reflect the changes to the statute made by IDEA Amendments of 1997.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, the Secretary has determined that the benefits of these final regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Paperwork Reduction Act of 1995

Sections 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.180, 300.192, 300.220–300.221, 300.240, 300.280–300.281, 300.284, 300.341, 300.343, 300.345, 300.347, 300.380–300.382, 300.402, 300.482–300.483, 300.503–300.504, 300.506, 300.508, 300.510–300.511, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, 300.574–300.575, 300.589, 300.600, 300.653, 300.660–300.662, 300.750–300.751, 300.754, 303.403, 303.510–303.512, and 303.520 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Assistance for Education of All Children with Disabilities: Complaint Procedures, §§ 300.600–300.662 and 303.510–303.512. Each SEA is required to adopt written procedures for resolving any complaint that meets the requirements in these proposed regulations.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 10 hours to issue a written decision to a complaint. There is an estimated average annual total of 1079 complaints submitted for processing. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 10,790 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: State Eligibility, §§ 300.110, 300.121, 300.123–300.130, 300.133, 300.135–300.137, 300.141–300.145, 300.155–300.156, 300.280–300.281, 300.284, 300.380–300.382, 300.402, 300.482–300.483, 300.510–300.511, 300.589, 300.600, 300.653, 303.403, and 303.520. Each State must have on file with the Secretary policies and procedures to demonstrate to the satisfaction of the Secretary that the State meets the specified conditions for assistance under this part. In the past, States were required to submit State plans every three years with one-third of the entities submitting plans to the Secretary each year. With the new statute, States will no longer be required to submit State plans. Rather, the policies and procedures currently approved by, and on file with, the Secretary that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 30 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 1740 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: LEA Eligibility, §§ 300.180, 300.192, 300.220–300.221, 300.240, 300.341, 300.343, 300.345, 300.347, 500.503–300.504, 300.532, 300.535, 300.543, 300.561–300.563, 300.565, 300.569, 300.571–300.572, and 300.574–300.575. Each local educational agency (LEA) and each State agency must have on file with the State educational agency (SEA) information to demonstrate that the agency meets the specified requirements for assistance under this part. In the past, each LEA was required to submit a periodic application to the SEA in order to establish its eligibility for assistance under this part. Under the new statutory changes, LEAs are no longer required to submit such applications. Rather, the policies and procedures currently approved by, and on file with, the SEA that are not inconsistent with the IDEA Amendments of 1997 will remain in effect unless amended.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 2 hours for each response for 15,376 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 30,752 hours. The Secretary invites comment on the estimated time it will take for LEAs to meet this reporting and recordkeeping requirement.

Collection of Information: Assistance for Education of All Children with Disabilities: List of Hearing Officers and Mediators, §§ 300.506 and 300.508. Each State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Each public agency must, also, keep a list of the persons who serve as hearing officers.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 25 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 3050 hours.

Collection of Information: Assistance for Education of All Children with Disabilities: Report of Children and Youth with Disabilities Receiving Special Education, §§ 300.750–300.751, and 300.754. Each SEA must submit an annual report of children served.

Annual reporting and recordkeeping burden for this collection of information is estimated to average 262 hours for each response for 58 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 15,196 hours.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and

- Minimizing the burden of the collection of information on those who re to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small local educational agencies receiving Federal funds under this program. These regulations would not have a significant economic impact on the small LEAs affected because these regulations impose minimal requirements beyond those that would otherwise be required by the statute. In addition, increased costs imposed by these regulations on LEAs are expected to be offset by savings to be realized by LEAs.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM published on October 22, 1997, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the NPRM and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Electronic Access to This Document

Anyone may also view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

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Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219-1511 or, toll free, 1-800-222-4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

List of Subjects

34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private schools, Reporting and recordkeeping requirements.

34 CFR Part 303

Education of individuals with disabilities, Grant programs—education, Infants and children, Reporting and recordkeeping requirements.

Dated: March 4, 1999.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number: 84.027 Assistance to States for the Education of Children with Disabilities, and 84.181 Early Intervention Program for Infants and Toddlers with Disabilities)

The Secretary amends Title 34 of the Code of Federal Regulations by revising part 300 and amending part 303 as follows:

1. Part 300 is revised to read as follows:

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

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Appendix A to Part 300—Notice of Interpretation
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Authority: 20 U.S.C. 1411-1420, unless otherwise noted.

Subpart A—General

Purposes, Applicability, and Regulations That Apply to This Program

§ 300.1 Purposes.

The purposes of this part are—

(a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(b) To ensure that the rights of children with disabilities and their parents are protected;

(c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and

(d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

(Authority: 20 U.S.C. 1400 note)

§ 300.2 Applicability of this part to State, local, and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The provisions of this part—

(1) Apply to all political subdivisions of the State that are involved in the education of children with disabilities, including—

(i) The State educational agency (SEA);

(ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA;

(iii) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or children with blindness); and

(iv) State and local juvenile and adult correctional facilities; and

(2) Are binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities—

(1) Referred to or placed in private schools and facilities by that public agency; or

(2) Placed in private schools by their parents under the provisions of § 300.403(c).

(Authority: 20 U.S.C. 1412)

§ 300.3 Regulations that apply.

The following regulations apply to this program:

(a) 34 CFR part 76 (State-Administered Programs) except for §§ 76.125–76.137 and 76.650–76.662.

(b) 34 CFR part 77 (Definitions).

(c) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(d) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(e) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(f) 34 CFR part 82 (New Restrictions on Lobbying).

(g) 34 CFR part 85 (Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)).

(h) The regulations in this part—34 CFR part 300 (Assistance for Education of Children with Disabilities).

(Authority: 20 U.S.C. 1221e–3(a)(1))

Definitions Used in This Part

§ 300.4 Act.

As used in this part, *Act* means the Individuals with Disabilities Education Act (IDEA), as amended.

(Authority: 20 U.S.C. 1400(a))

§ 300.5 Assistive technology device.

As used in this part, *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability.

(Authority: 20 U.S.C. 1401(1))

§ 300.6 Assistive technology service.

As used in this part, *Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes—

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(Authority: 20 U.S.C. 1401(2))

§ 300.7 Child with a disability.

(a) *General.* (1) As used in this part, the term *child with a disability* means a child evaluated in accordance with §§ 300.530–300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.530–300.536, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a *child with a disability* under this part.

(ii) If, consistent with § 300.26(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a *child with a disability* under paragraph (a)(1) of this section.

(b) *Children aged 3 through 9 experiencing developmental delays.* The term *child with a disability* for children aged 3 through 9 may, at the discretion of the State and LEA and in accordance with § 300.313, include a child—

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(2) Who, by reason thereof, needs special education and related services.

(c) *Definitions of disability terms.* The terms used in this definition are defined as follows:

(1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(ii) A child who manifests the characteristics of "autism" after age 3 could be diagnosed as having "autism" if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) *Emotional disturbance* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(5) *Hearing impairment* means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) *Mental retardation* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) *Multiple disabilities* means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(8) *Orthopedic impairment* means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) *Other health impairment* means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

(10) *Specific learning disability* is defined as follows:

(i) *General.* The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) *Disorders not included.* The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) *Speech or language impairment* means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) *Traumatic brain injury* means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) *Visual impairment including blindness* means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(3)(A) and (B); 1401(26))

§ 300.8 Consent.

As used in this part, the term *consent* has the meaning given that term in § 300.500(b)(1).

(Authority: 20 U.S.C. 1415(a))

§ 300.9 Day; business day; school day.

As used in this part, the term—

(a) Day means calendar day unless otherwise indicated as business day or school day;

(b) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in § 300.403(d)(1)(ii)); and

(c)(1) *School day* means any day, including a partial day, that children are in attendance at school for instructional purposes.

(2) The term *school day* has the same meaning for all children in school, including children with and without disabilities.

(Authority: 20 U.S.C. 1221e–3)

§ 300.10 Educational service agency.

As used in this part, the term *educational service agency*—

(a) Means a regional public multiservice agency—

(1) Authorized by State law to develop, manage, and provide services or programs to LEAs; and

(2) Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the State;

(b) Includes any other public institution or agency having administrative control and direction over a public elementary or secondary school; and

(c) Includes entities that meet the definition of *intermediate educational unit* in section 602(23) of IDEA as in effect prior to June 4, 1997.

(Authority: 20 U.S.C. 1401(4))

§ 300.11 Equipment.

As used in this part, the term *equipment* means—

(a) Machinery, utilities, and built-in equipment and any necessary

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enclosures or structures to house the machinery, utilities, or equipment; and

(b) All other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(Authority: 20 U.S.C. 1401(6))

§ 300.12 Evaluation.

As used in this part, the term *evaluation* has the meaning given that term in § 300.500(b)(2).

(Authority: 20 U.S.C. 1415(a))

§ 300.13 Free appropriate public education.

As used in this part, the term *free appropriate public education* or *FAPE* means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340–300.350.

(Authority: 20 U.S.C. 1401(8))

§ 300.14 Include.

As used in this part, the term *include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1221e–3)

§ 300.15 Individualized education program.

As used in this part, the term *individualized education program* or *IEP* has the meaning given the term in § 300.340(a).

(Authority: 20 U.S.C. 1401(11))

§ 300.16 Individualized education program team.

As used in this part, the term *individualized education program team* or *IEP team* means a group of individuals described in § 300.344 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(Authority: 20 U.S.C. 1221e–3)

§ 300.17 Individualized family service plan.

As used in this part, the term *individualized family service plan* or *IFSP* has the meaning given the term in 34 CFR 303.340(b).

(Authority: 20 U.S.C. 1401(12))

§ 300.18 Local educational agency.

(a) As used in this part, the term *local educational agency* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

(b) The term includes—

(1) An educational service agency, as defined in § 300.10;

(2) Any other public institution or agency having administrative control and direction of a public elementary or secondary school, including a public charter school that is established as an LEA under State law; and

(3) An elementary or secondary school funded by the Bureau of Indian Affairs, and not subject to the jurisdiction of any SEA other than the Bureau of Indian Affairs, but only to the extent that the inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under this Act with the smallest student population.

(Authority: 20 U.S.C. 1401(15))

§ 300.19 Native language.

(a) As used in this part, the term *native language*, if used with reference to an individual of limited English proficiency, means the following:

(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)(2) of this section.

(2) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.

(b) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, braille, or oral communication).

(Authority: 20 U.S.C. 1401(16))

§ 300.20 Parent.

(a) *General.* As used in this part, the term parent means—

(1) A natural or adoptive parent of a child;

(2) A guardian but not the State if the child is a ward of the State;

(3) A person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or

(4) A surrogate parent who has been appointed in accordance with § 300.515.

(b) *Foster parent.* Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent under Part B of the Act if—

(1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law; and

(2) The foster parent—

(i) Has an ongoing, long-term parental relationship with the child;

(ii) Is willing to make the educational decisions required of parents under the Act; and

(iii) Has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1401(19))

§ 300.21 Personally identifiable

As used in this part, the term *personally identifiable* has the meaning given that term in § 300.500(b)(3).

(Authority: 20 U.S.C. 1415(a))

§ 300.22 Public agency.

As used in this part, the term *public agency* includes the SEA, LEAs, ESAs, public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412(a)(1)(A), (a)(11))

§ 300.23 Qualified personnel.

As used in this part, the term *qualified personnel* means personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services.

(Authority: 20 U.S.C. 1221e–3)

§ 300.24 Related services.

(a) *General.* As used in this part, the term *related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) *Individual terms defined.* The terms used in this definition are defined as follows:

(1) *Audiology* includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification and assessment of disabilities in children* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Medical services* means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) *Occupational therapy*—

(i) Means services provided by a qualified occupational therapist; and

(ii) Includes—

(A) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.

(6) *Orientation and mobility services*—

(i) Means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes teaching students the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(B) To use the long cane to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(7) *Parent counseling and training means*—

(i) Assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

(8) *Physical therapy* means services provided by a qualified physical therapist.

(9) *Psychological services* includes—

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(10) *Recreation* includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(11) *Rehabilitation counseling services* means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(12) *School health services* means services provided by a qualified school nurse or other qualified person.

(13) *Social work services in schools* includes—

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(14) *Speech-language pathology services* includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(15) *Transportation* includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(22))

§ 300.25 Secondary school.

As used in this part, the term *secondary school* means a nonprofit institutional day or residential school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(Authority: 20 U.S.C. 1401(23))

§ 300.26 Special education.

(a) *General.* (1) As used in this part, the term *special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes each of the following, if it meets the requirements of paragraph (a)(1) of this section:

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education*—

(i) Means the development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially-designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401(25))

§ 300.27 State.

As used in this part, the term *State* means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(Authority: 20 U.S.C. 1401(27))

§ 300.28 Supplementary aids and services.

As used in this part, the term *supplementary aids and services* means, aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.550–300.556.

(Authority: 20 U.S.C. 1401(29))

§ 300.29 Transition services.

(a) As used in this part, *transition services* means a coordinated set of activities for a student with a disability that—

(1) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(3) Includes—

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(b) Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education.

(Authority: 20 U.S.C. 1401(30))

§ 300.30 Definitions in EDGAR.

The following terms used in this part are defined in 34 CFR 77.1:

Application
Award
Contract
Department
EDGAR
Elementary school
Fiscal year
Grant
Nonprofit
Project
Secretary
Subgrant
State educational agency

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart B—State and Local Eligibility

State Eligibility—General

§ 300.110 Condition of assistance.

(a) A State is eligible for assistance under Part B of the Act for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the conditions in §§ 300.121–300.156.

(b) To meet the requirement of paragraph (a) of this section, the State must have on file with the Secretary—

(1) The information specified in §§ 300.121–300.156 that the State uses to implement the requirements of this part; and

(2) Copies of all applicable State statutes, regulations, and other State documents that show the basis of that information.

(Authority: 20 U.S.C. 1412(a))

§ 300.111 Exception for prior State policies and procedures on file with the Secretary.

If a State has on file with the Secretary policies and procedures approved by the Secretary that demonstrate that the State meets any requirement of § 300.110, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the Secretary considers the State to have met the requirement for purposes of receiving a grant under Part B of the Act.

(Authority: 20 U.S.C. 1412(c)(1))

§ 300.112 Amendments to State policies and procedures.

(a) *Modifications made by a State.* (1) Subject to paragraph (b) of this section, policies and procedures submitted by a State in accordance with this subpart remain in effect until the State submits to the Secretary the modifications that the State decides are necessary.

(2) The provisions of this subpart apply to a modification to a State's policies and procedures in the same manner and to the same extent that they apply to the State's original policies and procedures.

(b) *Modifications required by the Secretary.* The Secretary may require a State to modify its policies and procedures, but only to the extent necessary to ensure the State's compliance with this part, if—

(1) After June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of this Act or regulations by a Federal court or a State's highest court; or

(3) There is an official finding of noncompliance with Federal law or regulations.

(Authority: 20 U.S.C. 1412(c)(2) and (3))

§ 300.113 Approval by the Secretary.

(a) *General.* If the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination.

(b) *Notice and hearing before determining a State is not eligible.* The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until after providing the State reasonable notice and an opportunity for a hearing in accordance with the procedures in §§ 300.581–300.586.

(Authority: 20 U.S.C. 1412(d))

§§ 300.114—300.120 [Reserved]

State Eligibility—Specific Conditions

§ 300.121 Free appropriate public education (FAPE).

(a) *General.* Each State must have on file with the Secretary information that shows that, subject to § 300.122, the State has in effect a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school.

(b) *Required information.* The information described in paragraph (a) of this section must—

(1) Include a copy of each State statute, court order, State Attorney General opinion, and other State documents that show the source of the State's policy relating to FAPE; and

(2) Show that the policy—

(i)(A) Applies to all public agencies in the State; and

(B) Is consistent with the requirements of §§ 300.300–300.313; and

(ii) Applies to all children with disabilities, including children who have been suspended or expelled from school.

(c) *FAPE for children beginning at age 3.* (1) Each State shall ensure that—

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with § 300.342(c).

(2) If a child's third birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP or IFSP will begin.

(d) *FAPE for children suspended or expelled from school.* (1) A public agency need not provide services during periods of removal under § 300.520(a)(1) to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed.

(2) In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals, must—

(i) Provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP, if the removal is—

(A) Under the school personnel's authority to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement under § 300.519(b) (§ 300.520((a)(1)); or

(B) For behavior that is not a manifestation of the child's disability, consistent with § 300.524; and

(ii) Provide services consistent with § 300.522, regarding determination of the appropriate interim alternative educational setting, if the removal is—

(A) For drug or weapons offenses under § 300.520(a)(2); or

(B) Based on a hearing officer determination that maintaining the current placement of the child is substantially likely to result in injury to the child or to others if he or she remains in the current placement, consistent with § 300.521.

(3)(i) School personnel, in consultation with the child's special education teacher, determine the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP if the child is removed under the authority of school personnel to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement under § 300.519 (§ 300.520(a)(1)).

(ii) The child's IEP team determines the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP if the child is removed because of behavior that has been determined not to be a manifestation of the child's disability, consistent with § 300.524.

(e) *Children advancing from grade to grade.* (1) Each State shall ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child is advancing from grade to grade.

(2) The determination that a child described in paragraph (a)(1) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making those determinations.

(Authority: 20 U.S.C. 1412(a)(1))

§ 300.122 Exception to FAPE for certain ages.

(a) *General.* The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in one or more of those age groups.

(2)(i) Students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(A) Were not actually identified as being a child with a disability under § 300.7; and

(B) Did not have an IEP under Part B of the Act.

(ii) The exception in paragraph (a)(2)(i) of this section does not apply to students with disabilities, aged 18 through 21, who—

(A) Had been identified as a child with disability and had received services in accordance with an IEP, but

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who left school prior to their incarceration; or

(B) Did not have an IEP in their last educational setting, but who had actually been identified as a "child with a disability" under § 300.7.

(3)(i) Students with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to students who have graduated but have not been awarded a regular high school diploma.

(iii) Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice in accordance with § 300.503.

(b) *Documents relating to exceptions.* The State must have on file with the Secretary—

(1)(i) Information that describes in detail the extent to which the exception in paragraph (a)(1) of this section applies to the State; and

(ii) A copy of each State law, court order, and other documents that provide a basis for the exception; and

(2) With respect to paragraph (a)(2) of this section, a copy of the State law that excludes from services under Part B of the Act certain students who are incarcerated in an adult correctional facility.

(Authority: 20 U.S.C. 1412(a)(1)(B))

§ 300.123 Full educational opportunity goal (FEOG).

The State must have on file with the Secretary detailed policies and procedures through which the State has established a goal of providing full educational opportunity to all children with disabilities aged birth through 21.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.124 FEOG—timetable.

The State must have on file with the Secretary a detailed timetable for accomplishing the goal of providing full educational opportunity for all children with disabilities.

(Authority: 20 U.S.C. 1412(a)(2))

§ 300.125 Child find.

(a) *General requirement.* (1) The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(2) The requirements of paragraph (a)(1) of this section apply to—

(i) Highly mobile children with disabilities (such as migrant and homeless children); and

(ii) Children who are suspected of being a child with a disability under § 300.7 and in need of special education, even though they are advancing from grade to grade.

(b) *Documents relating to child find.* The State must have on file with the Secretary the policies and procedures described in paragraph (a) of this section, including—

(1) The name of the State agency (if other than the SEA) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) The name of each agency that participates in the planning and implementation of the child find activities and a description of the nature and extent of its participation;

(3) A description of how the policies and procedures under paragraph (a) of this section will be monitored to ensure that the SEA obtains—

(i) The number of children with disabilities within each disability category that have been identified, located, and evaluated; and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(4) A description of the method the State uses to determine which children are currently receiving special education and related services.

(c) *Child find for children from birth through age 2 when the SEA and lead agency for the Part C program are different.* (1) In States where the SEA and the State's lead agency for the Part C program are different and the Part C lead agency will be participating in the child find activities described in paragraph (a) of this section, a description of the nature and extent of the Part C lead agency's participation must be included under paragraph (b)(2) of this section.

(2) With the SEA's agreement, the Part C lead agency's participation may include the actual implementation of child find activities for infants and toddlers with disabilities.

(3) The use of an interagency agreement or other mechanism for providing for the Part C lead agency's participation does not alter or diminish the responsibility of the SEA to ensure compliance with the requirements of this section.

(d) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability listed in § 300.7 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

(e) *Confidentiality of child find data.* The collection and use of data to meet the requirements of this section are subject to the confidentiality requirements of §§ 300.560–300.577.

(Authority: 20 U.S.C. 1412 (a)(3)(A) and (B))

§ 300.126 Procedures for evaluation and determination of eligibility.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.530–300.536 are met.

(Authority: 20 U.S.C. 1412(a)(6)(B), (7))

§ 300.127 Confidentiality of personally identifiable information.

(a) The State must have on file in detail the policies and procedures that the State has undertaken to ensure protection of the confidentiality of any personally identifiable information, collected, used, or maintained under Part B of the Act.

(b) The Secretary uses the criteria in §§ 300.560–300.576 to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(8))

§ 300.128 Individualized education programs.

(a) *General.* The State must have on file with the Secretary information that shows that an IEP, or an IFSP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with §§ 300.340–300.350.

(b) *Required information.* The information described in paragraph (a) of this section must include—

(1) A copy of each State statute, policy, and standard that regulates the manner in which IEPs are developed, implemented, reviewed, and revised; and

(2) The procedures that the SEA follows in monitoring and evaluating those IEPs or IFSPs.

(Authority: 20 U.S.C. 1412(a)(4))

§ 300.129 Procedural safeguards.

(a) The State must have on file with the Secretary procedural safeguards that ensure that the requirements of §§ 300.500–300.529 are met.

(b) Children with disabilities and their parents must be afforded the procedural safeguards identified in paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(6)(A))

§ 300.130 Least restrictive environment.

(a) *General.* The State must have on file with the Secretary procedures that ensure that the requirements of §§ 300.550–300.556 are met, including the provision in § 300.551 requiring a continuum of alternative placements to meet the unique needs of each child with a disability.

(b) *Additional requirement.* (1) If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting where a child is served, the funding mechanism may not result in placements that violate the requirements of paragraph (a) of this section.

(2) If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate that paragraph.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.131 [Reserved]

§ 300.132 Transition of children from Part C to preschool programs.

The State must have on file with the Secretary policies and procedures to ensure that—

(a) Children participating in early-intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(8) of the Act;

(b) By the third birthday of a child described in paragraph (a) of this section, an IEP or, if consistent with § 300.342(c) and section 636(d) of the Act, an IFSP, has been developed and is being implemented for the child consistent with § 300.121(c); and

(c) Each LEA will participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) of the Act.

(Authority: 20 U.S.C. 1412(a)(9))

§ 300.133 Children in private schools.

The State must have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.400–300.403 and §§ 300.450–300.462 are met.

(Authority: 20 U.S.C. 1413(a)(4))

§ 300.134 [Reserved]

§ 300.135 Comprehensive system of personnel development.

(a) *General.* The State must have in effect, consistent with the purposes of this part and with section 635(a)(8) of the Act, a comprehensive system of personnel development that—

(1) Is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel; and

(2) Meets the requirements for a State improvement plan relating to personnel development in section 653(b)(2)(B) and (c)(3)(D) of the Act.

(b) *Information.* The State must have on file with the Secretary information that shows that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1412(a)(14))

§ 300.136 Personnel standards.

(a) *Definitions.* As used in this part—

(1) *Appropriate professional requirements in the State* means entry level requirements that—

(i) Are based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services; and

(ii) Establish suitable qualifications for personnel providing special education and related services under Part B of the Act to children with disabilities who are served by State, local, and private agencies (see § 300.2);

(2) *Highest requirements in the State applicable to a specific profession or discipline* means the highest entry-level academic degree needed for any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline;

(3) *Profession or discipline* means a specific occupational category that—

(i) Provides special education and related services to children with disabilities under Part B of the Act;

(ii) Has been established or designated by the State;

(iii) Has a required scope of responsibility and degree of supervision; and

(iv) Is not limited to traditional occupational categories; and

(4) *State-approved or -recognized certification, licensing, registration, or other comparable requirements* means the requirements that a State legislature either has enacted or has authorized a State agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.

(b) *Policies and procedures.* (1)(i) The State must have on file with the Secretary policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

(ii) The policies and procedures required in paragraph (b)(1)(i) of this section must provide for the establishment and maintenance of standards that are consistent with any State-approved or -recognized certification, licensing, registration, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

(2) Each State may—

(i) Determine the specific occupational categories required to provide special education and related services within the State; and

(ii) Revise or expand those categories as needed.

(3) Nothing in this part requires a State to establish a specified training standard (e.g., a masters degree) for personnel who provide special education and related services under Part B of the Act.

(4) A State with only one entry-level academic degree for employment of personnel in a specific profession or discipline may modify that standard as necessary to ensure the provision of FAPE to all children with disabilities in the State without violating the requirements of this section.

(c) *Steps for retraining or hiring personnel.* To the extent that a State's standards for a profession or discipline, including standards for temporary or emergency certification, are not based on the highest requirements in the State applicable to a specific profession or discipline, the State must provide the steps the State is taking and the procedures for notifying public agencies and personnel of those steps and the timelines it has established for the retraining or hiring of personnel to meet appropriate professional requirements in the State.

(d) *Status of personnel standards in the State.* (1) In meeting the requirements in paragraphs (b) and (c) of this section, a determination must be made about the status of personnel standards in the State. That determination must be based on current information that accurately describes, for each profession or discipline in which personnel are providing special education or related services, whether the applicable standards are consistent with the highest requirements in the State for that profession or discipline.

(2) The information required in paragraph (d)(1) of this section must be

on file in the SEA and available to the public.

(e) *Applicability of State statutes and agency rules.* In identifying the highest requirements in the State for purposes of this section, the requirements of all State statutes and the rules of all State agencies applicable to serving children with disabilities must be considered.

(f) *Use of paraprofessionals and assistants.* A State may allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services to children with disabilities under Part B of the Act.

(g) *Policy to address shortage of personnel.* (1) In implementing this section, a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of personnel that meet these qualifications, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in paragraph (b)(2) of this section, consistent with State law and the steps described in paragraph (c) of this section, within three years.

(2) If a State has reached its established date under paragraph (c) of this section, the State may still exercise the option under paragraph (g)(1) of this section for training or hiring all personnel in a specific profession or discipline to meet appropriate professional requirements in the State.

(3)(i) Each State must have a mechanism for serving children with disabilities if instructional needs exceed available personnel who meet appropriate professional requirements in the State for a specific profession or discipline.

(ii) A State that continues to experience shortages of qualified personnel must address those shortages in its comprehensive system of personnel development under § 300.135.

(Authority: 20 U.S.C. 1412(a)(15))

§ 300.137 Performance goals and indicators.

The State must have on file with the Secretary information to demonstrate that the State—

(a) Has established goals for the performance of children with disabilities in the State that—

(1) Will promote the purposes of this part, as stated in § 300.1; and

(2) Are consistent, to the maximum extent appropriate, with other goals and standards for all children established by the State;

(b) Has established performance indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates;

(c) Every two years, will report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under paragraph (a) of this section; and

(d) Based on its assessment of that progress, will revise its State improvement plan under subpart 1 of Part D of the Act as may be needed to improve its performance, if the State receives assistance under that subpart.

(Authority: 20 U.S.C. 1412(a)(16))

§ 300.138 Participation in assessments.

The State must have on file with the Secretary information to demonstrate that—

(a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary;

(b) As appropriate, the State or LEA—

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs;

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than, July 1, 2000, conducts the alternate assessments described in paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 1412(a)(17)(A))

§ 300.139 Reports relating to assessments.

(a) *General.* In implementing the requirements of § 300.138, the SEA shall make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following information:

(1) The number of children with disabilities participating—

(i) In regular assessments; and

(ii) In alternate assessments.

(2) The performance results of the children described in paragraph (a)(1) of this section if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children—

(i) On regular assessments (beginning not later than July 1, 1998); and

(ii) On alternate assessments (not later than July 1, 2000).

(b) *Combined reports.* Reports to the public under paragraph (a) of this section must include—

(1) Aggregated data that include the performance of children with disabilities together with all other children; and

(2) Disaggregated data on the performance of children with disabilities.

(c) *Timeline for disaggregation of data.* Data relating to the performance of children described under paragraph (a)(2) of this section must be disaggregated—

(1) For assessments conducted after July 1, 1998; and

(2) For assessments conducted before July 1, 1998, if the State is required to disaggregate the data prior to July 1, 1998.

(Authority: 20 U.S.C. 612(a)(17)(B))

§ 300.140 [Reserved]

§ 300.141 SEA responsibility for general supervision.

(a) The State must have on file with the Secretary information that shows that the requirements of § 300.600 are met.

(b) The information described under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other documents that show compliance with that paragraph.

(Authority: 20 U.S.C. 1412(a)(11))

§ 300.142 Methods of ensuring services.

(a) *Establishing responsibility for services.* The Chief Executive Officer or designee of that officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each noneducational public agency described in paragraph (b) of this section and the SEA, in order to ensure that all services described in paragraph (b)(1) of this section that are needed to ensure FAPE are provided, including the provision of these services during the pendency of any dispute under paragraph (a)(3) of this section. The agreement or mechanism must include the following:

(1) *Agency financial responsibility.* An identification of, or a method for

defining, the financial responsibility of each agency for providing services described in paragraph (b)(1) of this section to ensure FAPE to children with disabilities. The financial responsibility of each noneducational public agency described in paragraph (b) of this section, including the State Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of the LEA (or the State agency responsible for developing the child's IEP).

(2) *Conditions and terms of reimbursement*. The conditions, terms, and procedures under which an LEA must be reimbursed by other agencies.

(3) *Interagency disputes*. Procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(4) *Coordination of services procedures*. Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in paragraph (b)(1) of this section.

(b) *Obligation of noneducational public agencies*. (1) *General*. (i) If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to paragraph (a) of this section, to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in § 300.5 relating to assistive technology devices, § 300.6 relating to assistive technology services, § 300.24 relating to related services, § 300.28 relating to supplementary aids and services, and § 300.29 relating to transition services) that are necessary for ensuring FAPE to children with disabilities within the State, the public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement.

(ii) A noneducational public agency described in paragraph (b)(1)(i) of this section may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

(2) *Reimbursement for services by noneducational public agency*. If a public agency other than an educational agency fails to provide or pay for the special education and related services described in paragraph (b)(1) of this section, the LEA (or State agency responsible for developing the child's IEP) shall provide or pay for these services to the child in a timely manner. The LEA or State agency may then claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency shall reimburse the LEA or State agency in accordance with the terms of the interagency agreement or other mechanism described in paragraph (a)(1) of this section, and the agreement described in paragraph (a)(2) of this section.

(c) *Special rule*. The requirements of paragraph (a) of this section may be met through—

(1) State statute or regulation;

(2) Signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(3) Other appropriate written methods as determined by the Chief Executive Officer of the State or designee of that officer.

(d) *Information*. The State must have on file with the Secretary information to demonstrate that the requirements of paragraphs (a) through (c) of this section are met.

(e) *Children with disabilities who are covered by public insurance*. (1) A public agency may use the Medicaid or other public insurance benefits programs in which a child participates to provide or pay for services required under this part, as permitted under the public insurance program, except as provided in paragraph (e)(2) of this section.

(2) With regard to services required to provide FAPE to an eligible child under this part, the public agency—

(i) May not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the Act;

(ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parent otherwise would be required to pay; and

(iii) May not use a child's benefits under a public insurance program if that use would—

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discontinuation of insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.

(f) *Children with disabilities who are covered by private insurance*. (1) With regard to services required to provide FAPE to an eligible child under this part, a public agency may access a parent's private insurance proceeds only if the parent provides informed consent consistent with § 300.500(b)(1).

(2) Each time the public agency proposes to access the parent's private insurance proceeds, it must—

(i) Obtain parent consent in accordance with paragraph (f)(1) of this section; and

(ii) Inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(g) *Use of Part B funds*. (1) If a public agency is unable to obtain parental consent to use the parent's private insurance, or public insurance when the parent would incur a cost for a specified service required under this part, to ensure FAPE the public agency may use its Part B funds to pay for the service.

(2) To avoid financial cost to parents who otherwise would consent to use private insurance, or public insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

(h) *Proceeds from public or private insurance*. (1) Proceeds from public or private insurance will not be treated as program income for purposes of 34 CFR 80.25.

(2) If a public agency spends reimbursements from Federal funds (*e.g.*, Medicaid) for services under this part, those funds will not be considered "State or local" funds for purposes of the maintenance of effort provisions in §§ 300.154 and 300.231.

(i) *Construction*. Nothing in this part should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, or any other public insurance program.

(Authority: 20 U.S.C. 1412(a)(12)(A), (B), and (C); 1401(8))

§ 300.143 SEA implementation of procedural safeguards.

The State must have on file with the Secretary the procedures that the SEA (and any agency assigned responsibility pursuant to § 300.600(d)) follows to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

(Authority: 20 U.S.C. 1412(a)(11); 1415(a))

§ 300.144 Hearings relating to LEA eligibility.

The State must have on file with the Secretary procedures to ensure that the SEA does not make any final determination that an LEA is not eligible for assistance under Part B of the Act without first giving the LEA reasonable notice and an opportunity for a hearing under 34 CFR 76.401(d).

(Authority: 20 U.S.C. 1412(a)(13))

§ 300.145 Recovery of funds for misclassified children.

The State must have on file with the Secretary policies and procedures that ensure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 300.146 Suspension and expulsion rates.

The State must have on file with the Secretary information to demonstrate that the following requirements are met:

(a) *General.* The SEA examines data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

(1) Among LEAs in the State; or

(2) Compared to the rates for nondisabled children within the agencies.

(b) *Review and revision of policies.* If the discrepancies described in paragraph (a) of this section are occurring, the SEA reviews and, if appropriate, revises (or requires the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

(Authority: 20 U.S.C. 612(a)(22))

§ 300.147 Additional information if SEA provides direct services.

(a) If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency—

(1) Shall comply with any additional requirements of §§ 300.220–300.230(a) and 300.234–300.250 as if the agency were an LEA; and

(2) May use amounts that are otherwise available to the agency under Part B of the Act to serve those children without regard to § 300.184 (relating to excess costs).

(b) The SEA must have on file with the Secretary information to demonstrate that it meets the requirements of paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1412(b))

§ 300.148 Public participation.

(a) *General; exception.* (1) Subject to paragraph (a)(2) of this section, each State must ensure that, prior to the adoption of any policies and procedures needed to comply with this part, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities consistent with §§ 300.280–300.284.

(2) A State will be considered to have met paragraph (a)(1) of this section with regard to a policy or procedure needed to comply with this part if it can demonstrate that prior to the adoption of that policy or procedure, the policy or procedure was subjected to a public review and comment process that is required by the State for other purposes and is comparable to and consistent with the requirements of §§ 300.280–300.284.

(b) *Documentation.* The State must have on file with the Secretary information to demonstrate that the requirements of paragraph (a) of this section are met.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.149 [Reserved]

§ 300.150 State advisory panel.

The State must have on file with the Secretary information to demonstrate that the State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State in accordance with the requirements of §§ 300.650–300.653.

(Authority: 20 U.S.C. 1412(a)(21)(A))

§ 300.151 [Reserved]

§ 300.152 Prohibition against commingling.

(a) The State must have on file with the Secretary an assurance satisfactory to the Secretary that the funds under Part B of the Act are not commingled with State funds.

(b) The assurance in paragraph (a) of this section is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the Part B funds. Separate bank accounts are not required. (See 34 CFR 76.702 (Fiscal control and fund accounting procedures).)

(Authority: 20 U.S.C. 1412(a)(18)(B))

§ 300.153 State-level nonsupplanting.

(a) *General.* (1) Except as provided in § 300.230, funds paid to a State under Part B of the Act must be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of the SEA or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant these Federal, State, and local funds.

(2) The State must have on file with the Secretary information to demonstrate to the satisfaction of the Secretary that the requirements of paragraph (a)(1) of this section are met.

(b) *Waiver.* If the State provides clear and convincing evidence that all children with disabilities have available to them FAPE, the Secretary may waive, in whole or in part, the requirements of paragraph (a) of this section if the Secretary concurs with the evidence provided by the State under § 300.589.

(Authority: 20 U.S.C. 1412(a)(18)(c))

§ 300.154 Maintenance of State financial support.

(a) *General.* The State must have on file with the Secretary information to demonstrate, on either a total or per-capita basis, that the State will not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(b) *Reduction of funds for failure to maintain support.* The Secretary reduces the allocation of funds under section 611 of the Act for any fiscal year following the fiscal year in which the State fails to comply with the requirement of paragraph (a) of this section by the same amount by which the State fails to meet the requirement.

(c) *Waivers for exceptional or uncontrollable circumstances.* The

Secretary may waive the requirement of paragraph (a) of this section for a State, for one fiscal year at a time, if the Secretary determines that—

(1) Granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(2) The State meets the standard in § 300.589 for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the Act.

(d) *Subsequent years.* If, for any fiscal year, a State fails to meet the requirement of paragraph (a) of this section, including any year for which the State is granted a waiver under paragraph (c) of this section, the financial support required of the State in future years under paragraph (a) of this section must be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(Authority: 20 U.S.C. 1412(a)(19))

§ 300.155 Policies and procedures for use of Part B funds.

The State must have on file with the Secretary policies and procedures designed to ensure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B.

(Authority: 20 U.S.C. 1412(a)(18)(A))

§ 300.156 Annual description of use of Part B funds.

(a) In order to receive a grant in any fiscal year a State must annually describe—

(1) How amounts retained for State-level activities under § 300.602 will be used to meet the requirements of this part;

(2) How those amounts will be allocated among the activities described in §§ 300.621 and 300.370 to meet State priorities based on input from LEAs; and

(3) The percentage of those amounts, if any, that will be distributed to LEAs by formula.

(b) If a State's plans for use of its funds under §§ 300.370 and 300.620 for the forthcoming year do not change from the prior year, the State may submit a letter to that effect to meet the requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 1411(f)(5))

LEA and State Agency Eeligibility—General

§ 300.180 Condition of assistance.

An LEA or State agency is eligible for assistance under Part B of the Act for a fiscal year if the agency demonstrates to the satisfaction of the SEA that it meets the conditions in §§ 300.220–300.250.

(Authority: 20 U.S.C. 1413(a))

§ 300.181 Exception for prior LEA or State agency policies and procedures on file with the SEA.

If an LEA or a State agency described in § 300.194 has on file with the SEA policies and procedures that demonstrate that the LEA or State agency meets any requirement of § 300.180, including any policies and procedures filed under Part B of the Act as in effect before June 4, 1997, the SEA shall consider the LEA or State agency to have met the requirement for purposes of receiving assistance under Part B of the Act.

(Authority: 20 U.S.C. 1413(b)(1))

§ 300.182 Amendments to LEA policies and procedures.

(a) *Modification made by an LEA or a State agency.* (1) Subject to paragraph (b) of this section, policies and procedures submitted by an LEA or a State agency in accordance with this subpart remain in effect until it submits to the SEA the modifications that the LEA or State agency decides are necessary.

(2) The provisions of this subpart apply to a modification to an LEA's or State agency's policies and procedures in the same manner and to the same extent that they apply to the LEA's or State agency's original policies and procedures.

(b) *Modifications required by the SEA.* The SEA may require an LEA or a State agency to modify its policies and procedures, but only to the extent necessary to ensure the LEA's or State agency's compliance with this part, if—

(1) After June 4, 1997, the provisions of the Act or the regulations in this part are amended;

(2) There is a new interpretation of the Act by Federal or State courts; or

(3) There is an official finding of noncompliance with Federal or State law or regulations.

(Authority: 20 U.S.C. 1413(b))

§ 300.183 [Reserved]

§ 300.184 Excess cost requirement.

(a) *General.* Amounts provided to an LEA under Part B of the Act may be used only to pay the excess costs of providing special education and related services to children with disabilities.

(b) *Definition.* As used in this part, the term *excess costs* means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary or secondary school student, as may be appropriate. Excess costs must be computed after deducting—

(1) Amounts received—

(i) Under Part B of the Act;

(ii) Under Part A of title I of the Elementary and Secondary Education Act of 1965; or

(iii) Under Part A of title VII of that Act; and

(2) Any State or local funds expended for programs that would qualify for assistance under any of those parts.

(c) *LLimitation on use of Part B funds.* (1) The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to paragraph (c)(2) of this section.

(2) The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the ages 3, 4, 5, 18, 19, 20, or 21, if no local or State funds are available for nondisabled children in that age range. However, the LEA must comply with the nonsupplanting and other requirements of this part in providing the education and services for these children.

(Authority: 20 U.S.C. 1401(7), 1413(a)(2)(A))

§ 300.185 Meeting the excess cost requirement.

(a)(1) *General.* An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities before funds under Part B of the Act are used.

(2) The amount described in paragraph (a)(1) of this section is determined using the formula in § 300.184(b). This amount may not include capital outlay or debt service.

(b) *Joint establishment of eligibility.* If two or more LEAs jointly establish eligibility in accordance with § 300.190, the minimum average amount is the average of the combined minimum average amounts determined under § 300.184 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§§ 300.186–300.189 [Reserved]

§ 300.190 Joint establishment of eligibility.

(a) *General.* An SEA may require an LEA to establish its eligibility jointly with another LEA if the SEA determines that the LEA would be ineligible under this section because the agency would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

(b) *Charter school exception.* An SEA may not require a charter school that is an LEA to jointly establish its eligibility under paragraph (a) of this section unless it is explicitly permitted to do so under the State's charter school statute.

(c) *Amount of payments.* If an SEA requires the joint establishment of eligibility under paragraph (a) of this section, the total amount of funds made available to the affected LEAs must be equal to the sum of the payments that each LEA would have received under §§ 300.711–300.714 if the agencies were eligible for these payments.

(Authority: 20 U.S.C. 1413(e)(1), and (2))

§ 300.191 [Reserved]

§ 300.192 Requirements for establishing eligibility.

(a) *Requirements for LEAs in general.* LEAs that establish joint eligibility under this section must—

(1) Adopt policies and procedures that are consistent with the State's policies and procedures under §§ 300.121–300.156; and

(2) Be jointly responsible for implementing programs that receive assistance under Part B of the Act.

(b) *Requirements for educational service agencies in general.* If an educational service agency is required by State law to carry out programs under Part B of the Act, the joint responsibilities given to LEAs under Part B of the Act—

(1) Do not apply to the administration and disbursement of any payments received by that educational service agency; and

(2) Must be carried out only by that educational service agency.

(c) *Additional requirement.* Notwithstanding any other provision of §§ 300.190–300.192, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by § 300.130.

(Authority: 20 U.S.C. 1413(e)(3), and (4))

§ 300.193 [Reserved]

§ 300.194 State agency eligibility.

Any State agency that desires to receive a subgrant for any fiscal year under §§ 300.711–300.714 must demonstrate to the satisfaction of the SEA that—

(a) All children with disabilities who are participating in programs and projects funded under Part B of the Act receive FAPE, and that those children and their parents are provided all the rights and procedural safeguards described in this part; and

(b) The agency meets the other conditions of this subpart that apply to LEAs.

(Authority: 20 U.S.C. 1413(i))

§ 300.195 [Reserved]

§ 300.196 Notification of LEA or State agency in case of ineligibility.

If the SEA determines that an LEA or State agency is not eligible under Part B of the Act, the SEA shall—

(a) Notify the LEA or State agency of that determination; and

(b) Provide the LEA or State agency with reasonable notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c))

§ 300.197 LEA and State agency compliance.

(a) *General.* If the SEA, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under this section is failing to comply with any requirement described in §§ 300.220–300.250, the SEA shall reduce or may not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency is complying with that requirement.

(b) *Notice requirement.* Any State agency or LEA in receipt of a notice described in paragraph (a) of this section shall, by means of public notice, take the measures necessary to bring the pendency of an action pursuant to this section to the attention of the public within the jurisdiction of the agency.

(c) In carrying out its functions under this section, each SEA shall consider any decision resulting from a hearing under §§ 300.507–300.528 that is adverse to the LEA or State agency involved in the decision.

(Authority: 20 U.S.C. 1413(d))

LEA and State Agency Eligibility—Specific Conditions

§ 300.220 Consistency with State policies.

(a) *General.* The LEA, in providing for the education of children with disabilities within its jurisdiction, must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under §§ 300.121–300.156.

(b) *Policies on file with SEA.* The LEA must have on file with the SEA the policies and procedures described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(1))

§ 300.221 Implementation of CSPD.

The LEA must have on file with the SEA information to demonstrate that—

(a) All personnel necessary to carry out Part B of the Act within the jurisdiction of the agency are appropriately and adequately prepared, consistent with the requirements of §§ 300.380–300.382; and

(b) To the extent the LEA determines appropriate, it shall contribute to and use the comprehensive system of personnel development of the State established under § 300.135.

(Authority: 20 U.S.C. 1413(a)(3))

§§ 300.222–300.229 [Reserved]

§ 300.230 Use of amounts.

The LEA must have on file with the SEA information to demonstrate that amounts provided to the LEA under Part B of the Act—

(a) Will be expended in accordance with the applicable provisions of this part;

(b) Will be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with §§ 300.184–300.185; and

(c) Will be used to supplement State, local, and other Federal funds and not to supplant those funds.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§ 300.231 Maintenance of effort.

(a) *General.* Except as provided in §§ 300.232 and 300.233, funds provided to an LEA under Part B of the Act may not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year.

(b) *Information.* The LEA must have on file with the SEA information to demonstrate that the requirements of paragraph (a) of this section are met.

(c) *Standard.* (1) Except as provided in paragraph (c)(2) of this section, the SEA determines that an LEA complies with paragraph (a) of this section for purposes of establishing the LEA's eligibility for an award for a fiscal year if the LEA budgets, for the education of children with disabilities, at least the same total or per-capita amount from either of the following sources as the LEA spent for that purpose from the same source for the most recent prior year for which information is available:

(i) Local funds only.

(ii) The combination of State and local funds.

(2) An LEA that relies on paragraph (c)(1)(i) of this section for any fiscal year

must ensure that the amount of local funds it budgets for the education of children with disabilities in that year is at least the same, either in total or per capita, as the amount it spent for that purpose in—

(i) The most recent fiscal year for which information is available, if that year is, or is before, the first fiscal year beginning on or after July 1, 1997; or

(ii) If later, the most recent fiscal year for which information is available and the standard in paragraph (c)(1)(i) of this section was used to establish its compliance with this section.

(3) The SEA may not consider any expenditures made from funds provided by the Federal Government for which the SEA is required to account to the Federal Government or for which the LEA is required to account to the Federal Government directly or through the SEA in determining an LEA's compliance with the requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(2)(A))

§ 300.232 Exception to maintenance of effort.

An LEA may reduce the level of expenditures by the LEA under Part B of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to the following:

(a)(1) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel, who are replaced by qualified, lower-salaried staff.

(2) In order for an LEA to invoke the exception in paragraph (a)(1) of this section, the LEA must ensure that those voluntary retirements or resignations and replacements are in full conformity with:

(i) Existing school board policies in the agency;

(ii) The applicable collective bargaining agreement in effect at that time; and

(iii) Applicable State statutes.

(b) A decrease in the enrollment of children with disabilities.

(c) The termination of the obligation of the agency, consistent with this part, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child—

(1) Has left the jurisdiction of the agency;

(2) Has reached the age at which the obligation of the agency to provide FAPE to the child has terminated; or

(3) No longer needs the program of special education.

(d) The termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

(Authority: 20 U.S.C. 1413(a)(2)(B))

§ 300.233 Treatment of Federal funds in certain fiscal years.

(a)(1) Subject to paragraphs (a)(2) and (b) of this section, for any fiscal year for which amounts appropriated to carry out section 611 of the Act exceeds $4,100,000,000, an LEA may treat as local funds up to 20 percent of the amount of funds it receives under Part B of the Act that exceeds the amount it received under Part B of the Act for the previous fiscal year.

(2) The requirements of §§ 300.230(c) and 300.231 do not apply with respect to the amount that may be treated as local funds under paragraph (a)(1) of this section.

(b) If an SEA determines that an LEA is not meeting the requirements of this part, the SEA may prohibit the LEA from treating funds received under Part B of the Act as local funds under paragraph (a)(1) of this section for any fiscal year, but only if it is authorized to do so by the State constitution or a State statute.

(Authority: 20 U.S.C. 1413(a)(2)(C))

§ 300.234 Schoolwide programs under title I of the ESEA.

(a) *General; limitation on amount of Part B funds used.* An LEA may use funds received under Part B of the Act for any fiscal year to carry out a schoolwide program under section 1114 of the Elementary and Secondary Education Act of 1965, except that the amount used in any schoolwide program may not exceed—

(1)(i) The amount received by the LEA under Part B for that fiscal year; divided by

(ii) The number of children with disabilities in the jurisdiction of the LEA; and multiplied by

(2) The number of children with disabilities participating in the schoolwide program.

(b) *Funding conditions.* The funds described in paragraph (a) of this section are subject to the following conditions:

(1) The funds must be considered as Federal Part B funds for purposes of the calculations required by §§ 300.230(b) and (c).

(2) The funds may be used without regard to the requirements of § 300.230(a).

(c) *Meeting other Part B requirements.* Except as provided in paragraph (b) of this section, all other requirements of Part B must be met by an LEA using Part B funds in accordance with paragraph (a) of this section, including ensuring that children with disabilities in schoolwide program schools—

(1) Receive services in accordance with a properly developed IEP; and

(2) Are afforded all of the rights and services guaranteed to children with disabilities under the IDEA.

(Authority: 20 U.S.C. 1413(a)(2)(D))

§ 300.235 Permissive use of funds.

(a) *General.* Subject to paragraph (b) of this section, funds provided to an LEA under Part B of the Act may be used for the following activities:

(1) *Services and aids that also benefit nondisabled children.* For the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.

(2) *Integrated and coordinated services system.* To develop and implement a fully integrated and coordinated services system in accordance with § 300.244.

(b) *Non-applicability of certain provisions.* An LEA does not violate §§ 300.152, 300.230, and 300.231 based on its use of funds provided under Part B of the Act in accordance with paragraphs (a)(1) and (a)(2) of this section.

(Authority: 20 U.S.C. 1413(a)(4))

§§ 300.236–300.239 [Reserved]

§ 300.240 Information for SEA.

(a) The LEA shall provide the SEA with information necessary to enable the SEA to carry out its duties under Part B of the Act, including, with respect to §§ 300.137 and 300.138, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

(b) The LEA must have on file with the SEA an assurance satisfactory to the SEA that the LEA will comply with the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1413(a)(6))

§ 300.241 Treatment of charter schools and their students.

The LEA must have on file with the SEA information to demonstrate that in carrying out this part with respect to charter schools that are public schools of the LEA, the LEA will—

(a) Serve children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and

(b) Provide funds under Part B of the Act to those schools in the same manner as it provides those funds to its other schools.

(Authority: 20 U.S.C. 1413(a)(5))

§ 300.242 Public information.

The LEA must have on file with the SEA information to demonstrate to the satisfaction of the SEA that it will make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the Act.

(Authority: 20 U.S.C. 1413(a)(7))

§ 300.243 [Reserved]

§ 300.244 Coordinated services system.

(a) *General.* An LEA may not use more than 5 percent of the amount the agency receives under Part B of the Act for any fiscal year, in combination with other amounts (which must include amounts other than education funds), to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families.

(b) *Activities.* In implementing a coordinated services system under this section, an LEA may carry out activities that include—

(1) Improving the effectiveness and efficiency of service delivery, including developing strategies that promote accountability for results;

(2) Service coordination and case management that facilitate the linkage of IEPs under Part B of the Act and IFSPs under Part C of the Act with individualized service plans under multiple Federal and State programs, such as title I of the Rehabilitation Act of 1973 (vocational rehabilitation), title XIX of the Social Security Act (Medicaid), and title XVI of the Social Security Act (supplemental security income);

(3) Developing and implementing interagency financing strategies for the provision of education, health, mental health, and social services, including transition services and related services under the Act; and

(4) Interagency personnel development for individuals working on coordinated services.

(c) *Coordination with certain projects under Elementary and Secondary Education Act of 1965.* If an LEA is carrying out a coordinated services project under title XI of the Elementary and Secondary Education Act of 1965 and a coordinated services project under Part B of the Act in the same schools, the agency shall use the amounts under § 300.244 in accordance with the requirements of that title.

(Authority: 20 U.S.C. 1413(f))

School-Based Improvement Plan

§ 300.245 School-based improvement plan.

(a) *General.* Each LEA may, in accordance with paragraph (b) of this section, use funds made available under Part B of the Act to permit a public school within the jurisdiction of the LEA to design, implement, and evaluate a school-based improvement plan that—

(1) Is consistent with the purposes described in section 651(b) of the Act; and

(2) Is designed to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with § 300.235(a) and (b) in that public school.

(b) *Authority.* (1) *General.* An SEA may grant authority to an LEA to permit a public school described in § 300.245 (through a school-based standing panel established under § 300.247(b)) to design, implement, and evaluate a school-based improvement plan described in § 300.245 for a period not to exceed 3 years.

(2) *Responsibility of LEA.* If an SEA grants the authority described in paragraph (b)(1) of this section, an LEA that is granted this authority must have the sole responsibility of oversight of all activities relating to the design, implementation, and evaluation of any school-based improvement plan that a public school is permitted to design under this section.

(Authority: 20 U.S.C. 1413(g)(1) and (g)(2)).

§ 300.246 Plan requirements.

A school-based improvement plan described in § 300.245 must—

(a) Be designed to be consistent with the purposes described in section 651(b) of the Act and to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with § 300.235(a) and (b), who attend the school for which the plan is designed and implemented;

(b) Be designed, evaluated, and, as appropriate, implemented by a school-based standing panel established in accordance with § 300.247(b);

(c) Include goals and measurable indicators to assess the progress of the public school in meeting these goals; and

(d) Ensure that all children with disabilities receive the services described in their IEPs.

(Authority: 20 U.S.C. 1413(g)(3))

§ 300.247 Responsibilities of the LEA.

An LEA that is granted authority under § 300.245(b) to permit a public school to design, implement, and evaluate a school-based improvement plan shall—

(a) Select each school under the jurisdiction of the agency that is eligible to design, implement, and evaluate the plan;

(b) Require each school selected under paragraph (a) of this section, in accordance with criteria established by the LEA under paragraph (c) of this section, to establish a school-based standing panel to carry out the duties described in § 300.246(b);

(c) Establish—

(1) Criteria that must be used by the LEA in the selection of an eligible school under paragraph (a) of this section;

(2) Criteria that must be used by a public school selected under paragraph (a) of this section in the establishment of a school-based standing panel to carry out the duties described in § 300.246(b) and that ensure that the membership of the panel reflects the diversity of the community in which the public school is located and includes, at a minimum—

(i) Parents of children with disabilities who attend a public school, including parents of children with disabilities from unserved and underserved populations, as appropriate;

(ii) Special education and general education teachers of public schools;

(iii) Special education and general education administrators, or the designee of those administrators, of those public schools; and

(iv) Related services providers who are responsible for providing services to the children with disabilities who attend those public schools; and

(3) Criteria that must be used by the LEA with respect to the distribution of funds under Part B of the Act to carry out this section;

(d) Disseminate the criteria established under paragraph (c) of this section to local school district personnel and local parent organizations within the jurisdiction of the LEA;

(e) Require a public school that desires to design, implement, and evaluate a school-based improvement plan to submit an application at the time, in the manner and accompanied by the information, that the LEA shall reasonably require; and

(f) Establish procedures for approval by the LEA of a school-based improvement plan designed under Part B of the Act.

(Authority:1413(g)(4))

§ 300.248 Limitation.

A school-based improvement plan described in § 300.245(a) may be submitted to an LEA for approval only if a consensus with respect to any matter relating to the design, implementation, or evaluation of the goals of the plan is reached by the school-based standing panel that designed the plan.

(Authority: 20 U.S.C. 1413(g)(5))

§ 300.249 Additional requirements.

(a) *Parental involvement.* In carrying out the requirements of §§ 300.245–300.250, an LEA shall ensure that the parents of children with disabilities are involved in the design, evaluation, and, if appropriate, implementation of school-based improvement plans in accordance with this section.

(b) *Plan approval.* An LEA may approve a school-based improvement plan of a public school within the jurisdiction of the agency for a period of 3 years, if—

(1) The approval is consistent with the policies, procedures, and practices established by the LEA and in accordance with §§ 300.245–300.250; and

(2) A majority of parents of children who are members of the school-based standing panel, and a majority of other members of the school-based standing panel that designed the plan, agree in writing to the plan.

(Authority: 20 U.S.C. 1413(g)(6))

§ 300.250 Extension of plan.

If a public school within the jurisdiction of an LEA meets the applicable requirements and criteria described in §§ 300.246 and 300.247 at the expiration of the 3-year approval period described § 300.249(b), the agency may approve a school-based improvement plan of the school for an additional 3-year period.

(Authority: 20 U.S.C. 1413(g)(7))

Secretary of the Interior—Eligibility

§ 300.260 Submission of information.

The Secretary may provide the Secretary of the Interior amounts under § 300.715(b) and (c) for a fiscal year only if the Secretary of the Interior submits to the Secretary information that—

(a) Meets the requirements of section 612(a)(1), (3)—(9), (10)(B), (C), (11)—(12), (14)—(17), (20), (21) and (22) of the Act (including monitoring and evaluation activities);

(b) Meets the requirements of section 612(b) and (e) of the Act;

(c) Meets the requirements of section 613(a)(1), (2)(A)(i), (6), and (7) of the Act;

(d) Meets the requirements of this part that implement the sections of the Act listed in paragraphs (a)–(c) of this section;

(e) Includes a description of how the Secretary of the Interior will coordinate the provision of services under Part B of the Act with LEAs, tribes and tribal organizations, and other private and Federal service providers;

(f) Includes an assurance that there are public hearings, adequate notice of the hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures described in paragraph (a) of this section;

(g) Includes an assurance that the Secretary of the Interior will provide the information that the Secretary may require to comply with section 618 of the Act, including data on the number of children with disabilities served and the types and amounts of services provided and needed;

(h)(1) Includes an assurance that the Secretary of the Interior and the Secretary of Health and Human Services have entered into a memorandum of agreement, to be provided to the Secretary, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with the SEAs and LEAs and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations.

(2) The agreement must provide for the apportionment of responsibilities and costs, including child find, evaluation, diagnosis, remediation or therapeutic measures, and (if appropriate) equipment and medical or personal supplies, as needed for a child with a disability to remain in a school or program; and

(i) Includes an assurance that the Department of the Interior will cooperate with the Department in its exercise of monitoring and oversight of the requirements in this section and §§ 300.261–300.267, and any agreements entered into between the Secretary of the Interior and other entities under Part B of the Act, and will fulfill its duties under Part B of the Act. Section 616(a) of the Act applies to the information described in this section.

(Authority: 20 U.S.C. 1411(i)(2))

§ 300.261 Public participation.

In fulfilling the requirements of § 300.260 the Secretary of the Interior shall provide for public participation consistent with §§ 300.280–300.284.

(Authority: 20 U.S.C. 1411(i))

§ 300.262 Use of Part B funds.

(a) The Department of the Interior may use five percent of its payment under § 300.715(b) and (c) in any fiscal year, or $500,000, whichever is greater, for administrative costs in carrying out the provisions of this part.

(b) Payments to the Secretary of the Interior under § 300.716 must be used in accordance with that section.

(Authority: 20 U.S.C. 1411(i))

§ 300.263 Plan for coordination of services.

(a) The Secretary of the Interior shall develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations covered under Part B of the Act.

(b) The plan must provide for the coordination of services benefiting these children from whatever source, including tribes, the Indian Health Service, other BIA divisions, and other Federal agencies.

(c) In developing the plan, the Secretary of the Interior shall consult with all interested and involved parties.

(d) The plan must be based on the needs of the children and the system best suited for meeting those needs, and may involve the establishment of cooperative agreements between the BIA, other Federal agencies, and other entities.

(e) The plan also must be distributed upon request to States, SEAs and LEAs, and other agencies providing services to infants, toddlers, and children with disabilities, to tribes, and to other interested parties.

(Authority: 20 U.S.C. 1411(i)(4))

§ 300.264 Definitions.

(a) Indian. As used in this part, the term *Indian* means an individual who is a member of an *Indian tribe.*

(b) *Indian tribe.* As used in this part, the term *Indian tribe* means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

(Authority: 20 U.S.C. 1401(9) and (10))

§ 300.265 Establishment of advisory board.

(a) To meet the requirements of section 612(a)(21) of the Act, the Secretary of the Interior shall establish, not later than December 4, 1997 under the BIA, an advisory board composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, and children with disabilities, including Indians with disabilities, Indian parents of the children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations, representatives from State Interagency Coordinating Councils under section 641 of the Act in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson must be selected by the Secretary of the Interior.

(b) The advisory board shall—

(1) Assist in the coordination of services within the BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, and children with disabilities;

(2) Advise and assist the Secretary of the Interior in the performance of the Secretary's responsibilities described in section 611(i) of the Act;

(3) Develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

(4) Provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved educational programming for Indian infants, toddlers, and children with disabilities; and

(5) Provide assistance in the preparation of information required under § 300.260(g).

(Authority: 20 U.S.C. 1411(i)(5))

§ 300.266 Annual report by advisory board.

(a) *General.* The advisory board established under § 300.265 shall prepare and submit to the Secretary of the Interior and to the Congress an annual report containing a description of the activities of the advisory board for the preceding year.

(b) *Report to the Secretary.* The Secretary of the Interior shall make available to the Secretary the report described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1411(i)(6)(A))

§ 300.267 Applicable regulations.

The Secretary of the Interior shall comply with the requirements of §§ 300.301–300.303, 300.305–300.309, 300.340–300.348, 300.351, 300.360–300.382, 300.400–300.402, 300.500–300.586, 300.600–300.621, and 300.660–300.662.

(Authority: 20 U.S.C. 1411(i)(2)(A))

Public Participation

§ 300.280 Public hearings before adopting State policies and procedures.

Prior to its adoption of State policies and procedures related to this part, the SEA shall—

(a) Make the policies and procedures available to the general public;

(b) Hold public hearings; and

(c) Provide an opportunity for comment by the general public on the policies and procedures.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.281 Notice.

(a) The SEA shall provide adequate notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the general public about—

(1) The purpose and scope of the State policies and procedures and their relation to Part B of the Act;

(2) The availability of the State policies and procedures;

(3) The date, time, and location of each public hearing;

(4) The procedures for submitting written comments about the policies and procedures; and

(5) The timetable for submitting the policies and procedures to the Secretary for approval.

(c) The notice must be published or announced—

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings; and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.282 Opportunity to participate; comment period.

(a) The SEA shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The policies and procedures must be available for comment for a period of at least 30 days following the date of the notice under § 300.281.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.283 Review of public comments before adopting policies and procedures.

Before adopting the policies and procedures, the SEA shall—

(a) Review and consider all public comments; and

(b) Make any necessary modifications in those policies and procedures.

(Authority: 20 U.S.C. 1412(a)(20))

§ 300.284 Publication and availability of approved policies and procedures.

After the Secretary approves a State's policies and procedures, the SEA shall give notice in newspapers or other media, or both, that the policies and procedures are approved. The notice must name places throughout the State where the policies and procedures are available for access by any interested person.

(Authority: 20 U.S.C. 1412(a)(20))

Subpart C—Services

Free Appropriate Public Education

§ 300.300 Provision of FAPE.

(a) *General.* (1) Subject to paragraphs (b) and (c) of this section and § 300.311, each State receiving assistance under this part shall ensure that FAPE is available to all children with disabilities, aged 3 through 21, residing in the State, including children with disabilities who have been suspended or expelled from school.

(2) As a part of its obligation under paragraph (a)(1) of this section, each State must ensure that the requirements of § 300.125 (to identify, locate, and evaluate all children with disabilities) are implemented by public agencies throughout the State.

(3)(i) The services provided to the child under this part address all of the child's identified special education and related services needs described in paragraph (a) of this section.

(ii) The services and placement needed by each child with a disability to receive FAPE must be based on the child's unique needs and not on the child's disability.

(b) *Exception for age ranges 3-5 and 18-21.* This paragraph provides the rules for applying the requirements in paragraph (a) of this section to children with disabilities aged 3, 4, 5, 18, 19, 20, and 21 within the State:

(1) If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.

(2) If a public agency provides education to nondisabled children in any of these age groups, it must make FAPE available to at least a proportionate number of children with disabilities of the same age.

(3) If a public agency provides education to 50 percent or more of its

children with disabilities in any disability category in any of these age groups, it must make FAPE available to all its children with disabilities of the same age who have that disability. This provision does not apply to children aged 3 through 5 for any fiscal year for which the State receives a grant under section 619(a)(1) of the Act.

(4) If a public agency provides education to a child with a disability in any of these age groups, it must make FAPE available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make FAPE available to a child with a disability in one of these age groups if—

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group; or

(ii) The requirement is inconsistent with a court order that governs the provision of free public education to children with disabilities in that State.

(c) *Children aged 3 through 21 on Indian reservations.* With the exception of children identified in § 300.715(b) and (c), the SEA shall ensure that all of the requirements of Part B of the Act are implemented for all children with disabilities aged 3 through 21 on reservations.

(Authority: 20 U.S.C. 1412(a)(1), 1411(i)(1)(C), S. Rep. No. 94—168, p. 19 (1975))

§ 300.301 FAPE—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

(c) Consistent with §§ 300.342(b)(2) and 300.343(b), the State must ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

(Authority: 20 U.S.C. 1401(8), 1412(a)(1))

§ 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B))

§ 300.303 Proper functioning of hearing aids.

Each public agency shall ensure that the hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(Authority: 20 U.S.C. 1412(a)(1))

§ 300.304 Full educational opportunity goal.

Each SEA shall ensure that each public agency establishes and implements a goal of providing full educational opportunity to all children with disabilities in the area served by the public agency.

(Authority: 20 U.S.C. 1412(a)(2)

§ 300.305 Program options.

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(Authority: 20 U.S.C. 1412(a)(2), 1413(a)(1))

§ 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(Authority: 20 U.S.C. 1412(a)(1))

§ 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE.

(b) *Regular physical education.* Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless—

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's IEP.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child shall provide the services directly or make arrangements for those services to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(Authority: 20 U.S.C. 1412(a)(25), 1412(a)(5)(A))

§ 300.308 Assistive technology.

(a) Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5–300.6, are made available to a child with a disability if required as a part of the child's—

(1) Special education under § 300.26;

(2) Related services under § 300.24; or

(3) Supplementary aids and services under §§ 300.28 and 300.550(b)(2).

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs access to those devices in order to receive FAPE.

(Authority: 20 U.S.C. 1412(a)(12)(B)(i))

§ 300.309 Extended school year services.

(a) *General.* (1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§ 300.340–300.350, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) *Definition.* As used in this section, the term *extended school year services* means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

(Authority: 20 U.S.C. 1412(a)(1))

§ 300.310 [Reserved]

§ 300.311 FAPE requirements for students with disabilities in adult prisons.

(a) *Exception to FAPE for certain students.* Except as provided in § 300.122(a)(2)(ii), the obligation to make FAPE available to all children with disabilities does not apply with respect to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility—

(1) Were not actually identified as being a child with a disability under § 300.7; and

(2) Did not have an IEP under Part B of the Act.

(b) *Requirements that do not apply.* The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(1) The requirements contained in § 300.138 and § 300.347(a)(5)(i) (relating to participation of children with disabilities in general assessments).

(2) The requirements in § 300.347(b) (relating to transition planning and transition services), with respect to the students whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(c) *Modifications of IEP or placement.* (1) Subject to paragraph (c)(2) of this section, the IEP team of a student with a disability, who is convicted as an adult under State law and incarcerated in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(2) The requirements of §§ 300.340(a) and 300.347(a) relating to IEPs, and 300.550(b) relating to LRE, do not apply with respect to the modifications described in paragraph (c)(1) of this section.

(Authority: 20 U.S.C. 1412(a)(1), 1414(d)(6))

§ 300.312 Children with disabilities in public charter schools.

(a) Children with disabilities who attend public charter schools and their parents retain all rights under this part.

(b) If the public charter school is an LEA, consistent with § 300.17, that receives funding under §§ 300.711–300.714, that charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.

(c) If the public charter school is a school of an LEA that receives funding under §§ 300.711–300.714 and includes other public schools—

(1) The LEA is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity; and

(2) The LEA must meet the requirements of § 300.241.

(d)(1) If the public charter school is not an LEA receiving funding under §§ 300.711–300.714, or a school that is part of an LEA receiving funding under §§ 300.711–300.714, the SEA is responsible for ensuring that the requirements of this part are met.

(2) Paragraph (d)(1) of this section does not preclude a State from assigning initial responsibility for ensuring the requirements of this part are met to another entity; however, the SEA must maintain the ultimate responsibility for ensuring compliance with this part, consistent with § 300.600.

(Authority: 20 U.S.C. 1413(a)(5))

§ 300.313 Children experiencing developmental delays.

(a) *Use of term developmental delay.* (1) A State that adopts the term *developmental delay* under § 300.7(b) determines whether it applies to children aged 3 through 9, or to a subset of that age range (e.g., ages 3 through 5).

(2) A State may not require an LEA to adopt and use the term *developmental delay* for any children within its jurisdiction.

(3) If an LEA uses the term *developmental delay* for children described in § 300.7(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(4) If a State does not adopt the term *developmental delay*, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(b) *Use of individual disability categories.* (1) Any State or LEA that elects to use the term *developmental delay* for children aged 3 through 9 may also use one or more of the disability categories described in § 300.7 for any child within that age range if it is determined, through the evaluation conducted under §§ 300.530–300.536, that the child has an impairment described in § 300.7, and because of that impairment needs special education and related services.

(2) The State or LEA shall ensure that all of the child's special education and related services needs that have been identified through the evaluation described in paragraph (b)(1) of this section are appropriately addressed.

(c) *Common definition of developmental delay.* A State may adopt a common definition of *developmental delay* for use in programs under Parts B and C of the Act.

(Authority: 20 U.S.C. 1401(3)(A) and (B))

Evaluations and Reevaluations

§ 300.320 Initial evaluations.

(a) Each public agency shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services under Part B of the Act—

(1) To determine if the child is a "child with a disability" under § 300.7; and

(2) To determine the educational needs of the child.

(b) In implementing the requirements of paragraph (a) of this section, the public agency shall ensure that—

(1) The evaluation is conducted in accordance with the procedures described in §§ 300.530–300.535; and

(2) The results of the evaluation are used by the child's IEP team in meeting the requirements of §§ 300.340–300.350.

(Authority: 20 U.S.C. 1414(a), (b), and (c))

§ 300.321 Reevaluations.

Each public agency shall ensure that—

(a) A reevaluation of each child with a disability is conducted in accordance with § 300.536; and

(b) The results of any reevaluations are addressed by the child's IEP team under §§ 300.340–300.349 in reviewing and, as appropriate, revising the child's IEP.

(Authority: 20 U.S.C. 1414(a)(2))

§§ 300.322–300.324 [Reserved]

Individualized Education Programs

§ 300.340 Definitions related to IEPs.

(a) *Individualized education program.* As used in this part, the term *individualized education program* or *IEP* means a written statement for a child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.341–300.350.

(b) *Participating agency.* As used in § 300.348, *participating agency* means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. 1401(11), 1412(a)(10)(B))

§ 300.341 Responsibility of SEA and other public agencies for IEPs.

(a) The SEA shall ensure that each public agency—

(1) Except as provided in §§ 300.450–300.462, develops and implements an IEP for each child with a disability served by that agency; and

(2) Ensures that an IEP is developed and implemented for each eligible child placed in or referred to a private school or facility by the public agency.

(b) Paragraph (a) of this section applies to—

(1) The SEA, if it is involved in providing direct services to children with disabilities, in accordance with § 300.370(a) and (b)(1); and

(2) Except as provided in § 300.600(d), the other public agencies described in § 300.2, including LEAs and other State agencies that provide special education and related services either directly, by contract, or through other arrangements.

(Authority: 20 U.S.C. 1412(a)(4), (a)(10)(B))

§ 300.342 When IEPs must be in effect.

(a) *General.* At the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction.

(b) *Implementation of IEPs.* Each public agency shall ensure that—

(1) An IEP—

(i) Is in effect before special education and related services are provided to an eligible child under this part; and

(ii) Is implemented as soon as possible following the meetings described under § 300.343;

(2) The child's IEP is accessible to ach regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and

(3) Each teacher and provider described in paragraph (b)(2) of this section is informed of—

(i) His or her specific responsibilities related to implementing the child's IEP; and

(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

(c) *IEP or IFSP for children aged 3 through 5.* (1) In the case of a child with a disability aged 3 through 5 (or, at the discretion of the SEA a 2-year-old child with a disability who will turn age 3 during the school year), an IFSP that contains the material described in section 636 of the Act, and that is developed in accordance with §§ 300.341–300.346 and §§ 300.349–300.350, may serve as the IEP of the child if using that plan as the IEP is—

(i) Consistent with State policy; and

(ii) Agreed to by the agency and the child's parents.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency shall—

(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; and

(ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(d) *Effective date for new requirements.* All IEPs developed, reviewed, or revised on or after July 1, 1998 must meet the requirements of §§ 300.340–300.350.

(Authority: 20 U.S.C. 1414(d)(2)(A) and (B), Pub. L. 105-17, sec. 201(a)(2)(A), (C))

§ 300.343 IEP meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with § 300.342(c), an IFSP).

(b) *Initial IEPs; provision of services.* (1) Each public agency shall ensure that within a reasonable period of time following the agency's receipt of parent consent to an initial evaluation of a child—

(i) The child is evaluated; and

(ii) If determined eligible under this part, special education and related services are made available to the child in accordance with an IEP.

(2) In meeting the requirement in paragraph (b)(1) of this section, a meeting to develop an IEP for the child must be conducted within 30-days of a determination that the child needs special education and related services.

(c) *Review and revision of IEPs.* Each public agency shall ensure that the IEP team—

(1) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(2) Revises the IEP as appropriate to address—

(i) Any lack of expected progress toward the annual goals described in § 300.347(a), and in the general curriculum, if appropriate;

(ii) The results of any reevaluation conducted under § 300.536;

(iii) Information about the child provided to, or by, the parents, as described in § 300.533(a)(1);

(iv) The child's anticipated needs; or

(v) Other matters.

(Authority: 20 U.S.C. 1413(a)(1), 1414(d)(4)(A))

§ 300.344 IEP team.

(a) *General.* The public agency shall ensure that the IEP team for each child with a disability includes—

(1) The parents of the child;

(2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

(3) At least one special education teacher of the child, or if appropriate, at least one special education provider of the child;

(4) A representative of the public agency who—

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(ii) Is knowledgeable about the general curriculum; and

(iii) Is knowledgeable about the availability of resources of the public agency;

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) If appropriate, the child.

(b) *Transition services participants.* (1) Under paragraph (a)(7) of this section, the public agency shall invite a student with a disability of any age to attend his or her IEP meeting if a purpose of the meeting will be the consideration of—

(i) The student's transition services needs under § 300.347(b)(1);

(ii) The needed transition services for the student under § 300.347(b)(2); or

(iii) Both.

(2) If the student does not attend the IEP meeting, the public agency shall

take other steps to ensure that the student's preferences and interests are considered.

(3)(i) In implementing the requirements of § 300.347(b)(2), the public agency also shall invite a representative of any other agency that is likely to be responsible for providing or paying for transition services.

(ii) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services.

(c) *Determination of knowledge and special expertise.* The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section shall be made by the party (parents or public agency) who invited the individual to be a member of the IEP.

(d) *Designating a public agency representative.* A public agency may designate another public agency member of the IEP team to also serve as the agency representative, if the criteria in paragraph (a)(4) of this section are satisfied.

(Authority: 20 U.S.C. 1401(30), 1414(d)(1)(A)(7), (B))

§ 300.345 Parent participation.

(a) *Public agency responsibility—general.* Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) *Information provided to parents.* (1) The notice required under paragraph (a)(1) of this section must—

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(ii) Inform the parents of the provisions in § 300.344(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child).

(2) For a student with a disability beginning at age 14, or younger, if appropriate, the notice must also—

(i) Indicate that a purpose of the meeting will be the development of a statement of the transition services needs of the student required in § 300.347(b)(1); and

(ii) Indicate that the agency will invite the student.

(3) For a student with a disability beginning at age 16, or younger, if appropriate, the notice must—

(i) Indicate that a purpose of the meeting is the consideration of needed transition services for the student required in § 300.347(b)(2);

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) *Other methods to ensure parent participation.* If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) *Conducting an IEP meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place, such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) *Use of interpreters or other action, as appropriate.* The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) *Parent copy of child's IEP.* The public agency shall give the parent a copy of the child's IEP at no cost to the parent.

(Authority: 20 U.S.C. 1414(d)(1)(B)(i))

§ 300.346 Development, review, and revision of IEP.

(a) *Development of IEP.* (1) *General.* In developing each child's IEP, the IEP team, shall consider—

(i) The strengths of the child and the concerns of the parents for enhancing the education of their child;

(ii) The results of the initial or most recent evaluation of the child; and

(iii) As appropriate, the results of the child's performance on any general State or district-wide assessment programs.

(2) *Consideration of special factors.* The IEP team also shall—

(i) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child requires assistive technology devices and services.

(b) *Review and Revision of IEP.* In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section.

(c) *Statement in IEP.* If, in considering the special factors described in paragraphs (a)(1) and (2) of this section, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.

(d) *Requirement with respect to regular education teacher.* The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of—

(1) Appropriate positive behavioral interventions and strategies for the child; and

(2) Supplementary aids and services, program modifications or supports for school personnel that will be provided for the child, consistent with § 300.347(a)(3).

(e) *Construction.* Nothing in this section shall be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

(Authority: 20 U.S.C. 1414(d)(3) and (4)(B) and (e))

§ 300.347 Content of IEP.

(a) *General.* The IEP for each child with a disability must include—

(1) A statement of the child's present levels of educational performance, including—

(i) How the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children); or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to—

(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities; and

(ii) Meeting each of the child's other educational needs that result from the child's disability;

(3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;

(5)(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and

(ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of—

(A) Why that assessment is not appropriate for the child; and

(B) How the child will be assessed;

(6) The projected date for the beginning of the services and modifications described in paragraph (a)(3) of this section, and the anticipated frequency, location, and duration of those services and modifications; and

(7) A statement of—

(i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and

(ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of—

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(b) *Transition services.* The IEP must include—

(1) For each student with a disability beginning at age 14 (or younger, if determined appropriate by the IEP team), and updated annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and

(2) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(c) *Transfer of rights.* In a State that transfers rights at the age majority, beginning at least one year before a student reaches the age of majority under State law, the student's IEP must include a statement that the student has been informed of his or her rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority, consistent with § 300.517.

(d) *Students with disabilities convicted as adults and incarcerated in adult prisons.* Special rules concerning the content of IEPs for students with disabilities convicted as adults and incarcerated in adult prisons are contained in § 300.311(b) and (c).

(Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6)(A)(ii))

§ 300.348 Agency responsibilities for transition services.

(a) If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with § 300.347(b)(1), the public agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the student set out in the IEP.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(Authority: 20 U.S.C. 1414(d)(5); 1414(d)(1)(A)(vii))

§ 300.349 Private school placements by public agencies.

(a) *Developing IEPs.* (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with §§ 300.346 and 300.347.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) *Reviewing and revising IEPs.* (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative—

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the IEP before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.350 IEP—accountability.

(a) *Provision of services.* Subject to paragraph (b) of this section, each public agency must—

(1) Provide special education and related services to a child with a disability in accordance with the child's IEP; and

(2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

(b) *Accountability.* Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives. However, the Act does not prohibit a State or public agency from establishing its own accountability systems regarding teacher, school, or agency performance.

(c) *Construction—parent rights.* Nothing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that the efforts required in paragraph (a) of this section are not being made.

(Authority: 20 U.S.C. 1414(d)); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Direct Services by the Sea

§ 300.360 Use of LEA allocation for direct services.

(a) *General.* An SEA shall use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local agency, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency—

(1) Has not provided the information needed to establish the eligibility of the agency under Part B of the Act;

(2) Is unable to establish and maintain programs of FAPE that meet the requirements of this part;

(3) Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or

(4) Has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of these children.

(b) *SEA responsibility if an LEA does not apply for Part B funds.* (1) If an LEA elects not to apply for its Part B allotment, the SEA must use those funds to ensure that FAPE is available to all eligible children residing in the jurisdiction of the LEA.

(2)(i) If the local allotment is not sufficient to meet the purpose described in paragraph (b)(1) of this section, the SEA must ensure compliance with §§ 300.121(a) and 300.300(a).

(ii) Consistent with § 300.301(a), the [State; SEA] may use whatever funding sources are available in the State to implement paragraph (b)(2)(i) of this section.

(c) *SEA administrative procedures.* (1) In meeting the requirements in paragraph (a) of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

(2) The excess cost requirements of §§ 300.184 and 300.185 do not apply to the SEA.

(Authority: 20 U.S.C. 1413(h)(1))

§ 300.361 Nature and location of services.

The SEA may provide special education and related services under § 300.360(a) in the manner and at the location it considers appropriate (including regional and State centers). However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions of §§ 300.550–300.556).

(Authority: 20 U.S.C. 1413(h)(2))

§§ 300.362–300.369 [Reserved]

§ 300.370 Use of SEA allocations.

(a) Each State shall use any funds it retains under § 300.602 and does not use for administration under § 300.620 for any of the following:

(1) Support and direct services, including technical assistance and personnel development and training.

(2) Administrative costs of monitoring and complaint investigation, but only to the extent that those costs exceed the costs incurred for those activities during fiscal year 1985.

(3) To establish and implement the mediation process required by § 300.506, including providing for the costs of mediators and support personnel.

(4) To assist LEAs in meeting personnel shortages.

(5) To develop a State Improvement Plan under subpart 1 of Part D of the Act.

(6) Activities at the State and local levels to meet the performance goals established by the State under § 300.137 and to support implementation of the State Improvement Plan under subpart 1 of Part D of the Act if the State receives funds under that subpart.

(7) To supplement other amounts used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under section 611 of the Act. This system must be coordinated with and, to the extent appropriate, build on the system of coordinated services developed by the State under Part C of the Act.

(8) For subgrants to LEAs for the purposes described in § 300.622 (local capacity building).

(b) For the purposes of paragraph (a) of this section—

(1) *Direct services* means services provided to a child with a disability by the State directly, by contract, or through other arrangements; and

(2) *Support services* includes implementing the comprehensive system of personnel development under §§ 300.380–300.382, recruitment and training of mediators, hearing officers, and surrogate parents, and public information and parent training activities relating to FAPE for children with disabilities.

(c) Of the funds an SEA retains under paragraph (a) of this section, the SEA may use the funds directly, or distribute them to LEAs on a competitive, targeted, or formula basis.

(Authority: 20 U.S.C. 1411(f)(3))

§ 300.371 [Reserved]

§ 300.372 Nonapplicability of requirements that prohibit commingling and supplanting of funds.

A State may use funds it retains under § 300.602 without regard to—

(a) The prohibition on commingling of funds in § 300.152; and

(b) The prohibition on supplanting other funds in § 300.153.

(Authority: 20 U.S.C. 1411(f)(1)(C))

Comprehensive System of Personnel Development (CSPD)

§ 300.380 General CSPD requirements.

(a) Each State shall develop and implement a comprehensive system of personnel development that—

(1) Is consistent with the purposes of this part and with section 635(a)(8) of the Act;

(2) Is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel;

(3) Meets the requirements of §§ 300.381 and 300.382; and

(4) Is updated at least every five years.

(b) A State that has a State improvement grant has met the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(14))

§ 300.381 Adequate supply of qualified personnel.

Each State must include, at least, an analysis of State and local needs for professional development for personnel to serve children with disabilities that includes, at a minimum—

(a) The number of personnel providing special education and related services; and

(b) Relevant information on current and anticipated personnel vacancies and shortages (including the number of individuals described in paragraph (a) of this section with temporary certification), and on the extent of certification or retraining necessary to eliminate these shortages, that is based, to the maximum extent possible, on existing assessments of personnel needs.

(Authority: 20 U.S.C. 1453(b)(2)(B))

§ 300.382 Improvement strategies.

Each State must describe the strategies the State will use to address the needs identified under § 300.381. These strategies must include how the State will address the identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities. The plan must include a description of how the State will—

(a) Prepare general and special education personnel with the content knowledge and collaborative skills needed to meet the needs of children with disabilities including how the State will work with other States on common certification criteria;

(b) Prepare professionals and paraprofessionals in the area of early intervention with the content knowledge and collaborative skills needed to meet the needs of infants and toddlers with disabilities;

(c) Work with institutions of higher education and other entities that (on both a pre-service and an in-service basis) prepare personnel who work with children with disabilities to ensure that those institutions and entities develop the capacity to support quality professional development programs that meet State and local needs;

(d) Work to develop collaborative agreements with other States for the joint support and development of programs to prepare personnel for which there is not sufficient demand within a single State to justify support or development of a program of preparation;

(e) Work in collaboration with other States, particularly neighboring States, to address the lack of uniformity and reciprocity in credentialing of teachers and other personnel;

(f) Enhance the ability of teachers and others to use strategies, such as behavioral interventions, to address the conduct of children with disabilities that impedes the learning of children with disabilities and others;

(g) Acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and how the State will, if appropriate, adopt promising practices, materials, and technology;

(h) Recruit, prepare, and retain qualified personnel, including personnel with disabilities and personnel from groups that are under-represented in the fields of regular education, special education, and related services;

(i) Insure that the plan is integrated, to the maximum extent possible, with other professional development plans and activities, including plans and activities developed and carried out under other Federal and State laws that address personnel recruitment and training; and

(j) Provide for the joint training of parents and special education, related services, and general education personnel.

(Authority: 20 U.S.C. 1453 (c)(3)(D))

§§ 300.383–300.387 [Reserved]

Subpart D—Children in Private Schools

Children With Disabilities in Private Schools Placed or Referred by Public Agencies

§ 300.400 Applicability of §§ 300.400–300.402.

Sections 300.401–300.402 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.401 Responsibility of State educational agency.

Each SEA shall ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency—

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§ 300.340–300.350; and

(2) At no cost to the parents;

(b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs (including the requirements of this part); and

(c) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1412(a)(10)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the SEA shall—

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1412(a)(10)(B))

Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue

§ 300.403 Placement of children by parents if FAPE is at issue.

(a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency shall include that child in the population whose needs are addressed consistent with §§ 300.450–300.462.

(b) *Disagreements about FAPE.* Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of §§ 300.500–300.517.

(c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) *Exception.* Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if—

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or

(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1412(a)(10)(C))

Children With Disabilities Enrolled by Their Parents in Private Schools

§ 300.450 Definition of "private school children with disabilities."

As used in this part, *private school children with disabilities* means children with disabilities enrolled by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400–300.402.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.451 Child find for private school children with disabilities.

(a) Each LEA shall locate, identify, and evaluate all private school children with disabilities, including religious-school children residing in the jurisdiction of the LEA, in accordance with §§ 300.125 and 300.220. The activities undertaken to carry out this responsibility for private school children with disabilities must be comparable to activities undertaken for children with disabilities in public schools.

(b) Each LEA shall consult with appropriate representatives of private school children with disabilities on how to carry out the activities described in paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(a)(10)(A)(ii))

§ 300.452 Provision of services—basic requirement.

(a) *General.* To the extent consistent with their number and location in the State, provision must be made for the participation of private school children with disabilities in the program assisted or carried out under Part B of the Act by providing them with special education and related services in accordance with §§ 300.453–300.462.

(b) *SEA Responsibility—services plan.* Each SEA shall ensure that, in accordance with paragraph (a) of this section and §§ 300.454–300.456, a services plan is developed and implemented for each private school child with a disability who has been designated to receive special education and related services under this part.

(Authority: 20 U.S.C. 1412(a)(10)(A)(i))

§ 300.453 Expenditures.

(a) *Formula.* To meet the requirement of § 300.452(a), each LEA must spend on providing special education and related services to private school children with disabilities—

(1) For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(g) of the Act as the number of private school children with disabilities aged 3 through 21 residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction aged 3 through 21; and

(2) For children aged 3 through 5, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of private school children with disabilities aged 3 through 5 residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction aged 3 through 5.

(b) *Child count.* (1) Each LEA shall—

(i) Consult with representatives of private school children in deciding how to conduct the annual count of the number of private school children with disabilities; and

(ii) Ensure that the count is conducted on December 1 or the last Friday of October of each year.

(2) The child count must be used to determine the amount that the LEA must spend on providing special education and related services to private school children with disabilities in the next subsequent fiscal year.

(c) *Expenditures for child find may not be considered.* Expenditures for child find activities described in § 300.451 may not be considered in determining whether the LEA has met the requirements of paragraph (a) of this section.

(d) *Additional services permissible.* State and local educational agencies are not prohibited from providing services to private school children with disabilities in excess of those required by this part, consistent with State law or local policy.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.454 Services determined.

(a) *No individual right to special education and related services.* (1) No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(2) Decisions about the services that will be provided to private school children with disabilities under §§ 300.452–300.462, must be made in accordance with paragraphs (b), and (c) of this section.

(b) *Consultation with representatives of private school children with disabilities.* (1) *General.* Each LEA shall consult, in a timely and meaningful way, with appropriate representatives of private school children with disabilities in light of the funding under § 300.453, the number of private school children with disabilities, the needs of private school children with disabilities, and their location to decide—

(i) Which children will receive services under § 300.452;

(ii) What services will be provided;

(iii) How and where the services will be provided; and

(iv) How the services provided will be evaluated.

(2) *Genuine opportunity.* Each LEA shall give appropriate representatives of private school children with disabilities a genuine opportunity to express their views regarding each matter that is subject to the consultation requirements in this section.

(3) *Timing.* The consultation required by paragraph (b)(1) of this section must occur before the LEA makes any decision that affects the opportunities of private school children with disabilities to participate in services under §§ 300.452–300.462.

(4) *Decisions.* The LEA shall make the final decisions with respect to the services to be provided to eligible private school children.

(c) *Services plan for each child served under §§ 300.450–300.462.* If a child with a disability is enrolled in a religious or other private school and will receive special education or related services from an LEA, the LEA shall—

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with § 300.455(b); and

(2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

(Authority: 1412(a)(10)(A))

§ 300.455 Services provided.

(a) *General.* (1) The services provided to private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools.

(2) Private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

(3) No private school child with a disability is entitled to any service or to any amount of a service the child would receive if enrolled in a public school.

(b) *Services provided in accordance with a services plan.* (1) Each private school child with a disability who has been designated to receive services under § 300.452 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in §§ 300.453–300.454, it will make available to private school children with disabilities.

(2) The services plan must, to the extent appropriate—

(i) Meet the requirements of § 300.347, with respect to the services provided; and

(ii) Be developed, reviewed, and revised consistent with §§ 300.342–300.346.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.456 Location of services; transportation.

(a) *On-site.* Services provided to private school children with disabilities may be provided on-site at a child's private school, including a religious school, to the extent consistent with law.

(b) *Transportation.* (1) *General.* (i) If necessary for the child to benefit from or participate in the services provided under this part, a private school child with a disability must be provided transportation—

(A) From the child's school or the child's home to a site other than the private school; and

(B) From the service site to the private school, or to the child's home, depending on the timing of the services.

(ii) LEAs are not required to provide transportation from the child's home to the private school.

(2) *Cost of transportation.* The cost of the transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the LEA has met the requirement of § 300.453.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.457 Complaints.

(a) *Due process inapplicable.* The procedures in §§ 300.504–300.515 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.452–300.462, including the provision of services indicated on the child's services plan.

(b) *Due process applicable.* The procedures in §§ 300.504–300.515 do apply to complaints that an LEA has failed to meet the requirements of § 300.451, including the requirements of §§ 300.530–300.543.

(c) *State complaints.* Complaints that an SEA or LEA has failed to meet the requirements of §§ 300.451–300.462 may be filed under the procedures in §§ 300.660–300.662.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.458 Separate classes prohibited.

An LEA may not use funds available under section 611 or 619 of the Act for classes that are organized separately on the basis of school enrollment or religion of the students if—

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.459 Requirement that funds not benefit a private school.

(a) An LEA may not use funds provided under section 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The LEA shall use funds provided under Part B of the Act to meet the special education and related services needs of students enrolled in private schools, but not for—

(1) The needs of a private school; or

(2) The general needs of the students enrolled in the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.460 Use of public school personnel.

An LEA may use funds available under sections 611 and 619 of the Act to make public school personnel available in other than public facilities—

(a) To the extent necessary to provide services under §§ 300.450–300.462 for private school children with disabilities; and

(b) If those services are not normally provided by the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.461 Use of private school personnel.

An LEA may use funds available under section 611 or 619 of the Act to pay for the services of an employee of a private school to provide services under §§ 300.450–300.462 if—

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.462 Requirements concerning property, equipment, and supplies for the benefit of private school children with disabilities.

(a) A public agency must keep title to and exercise continuing administrative control of all property, equipment, and supplies that the public agency acquires with funds under section 611 or 619 of the Act for the benefit of private school children with disabilities.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment and supplies placed in a private school—

(1) Are used only for Part B purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment and supplies from a private school if—

(1) The equipment and supplies are no longer needed for Part B purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes.

(e) No funds under Part B of the Act may be used for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 1412(a)(10)(A))

Procedures for By-Pass

§ 300.480 By-pass—general.

(a) The Secretary implements a by-pass if an SEA is, and was on December 2, 1983, prohibited by law from providing for the participation of private school children with disabilities in the program assisted or carried out under Part B of the Act, as required by section 612(a)(10)(A) of the Act and by §§ 300.452–300.462.

(b) The Secretary waives the requirement of section 612(a)(10)(A) of the Act and of §§ 300.452–300.462 if the Secretary implements a by-pass.

(Authority: 20 U.S.C. 1412(f)(1))

§ 300.481 Provisions for services under a by-pass.

(a) Before implementing a by-pass, the Secretary consults with appropriate public and private school officials, including SEA officials, in the affected State to consider matters such as—

(1) The prohibition imposed by State law that results in the need for a by-pass;

(2) The scope and nature of the services required by private school children with disabilities in the State, and the number of children to be served under the by-pass; and

(3) The establishment of policies and procedures to ensure that private school children with disabilities receive services consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.452–300.462.

(b) After determining that a by-pass is required, the Secretary arranges for the provision of services to private school children with disabilities in the State in a manner consistent with the requirements of section 612(a)(10)(A) of the Act and §§ 300.452–300.462 by providing services through one or more agreements with appropriate parties.

(c) For any fiscal year that a by-pass is implemented, the Secretary determines the maximum amount to be paid to the providers of services by multiplying—

(1) A per child amount that may not exceed the amount per child provided by the Secretary under Part B of the Act for all children with disabilities in the State for the preceding fiscal year; by

(2) The number of private school children with disabilities (as defined by §§ 300.7(a) and 300.450) in the State, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities.

(d) The Secretary deducts from the State's allocation under Part B of the Act the amount the Secretary determines is necessary to implement a by-pass and pays that amount to the provider of services. The Secretary may withhold this amount from the State's allocation pending final resolution of any investigation or complaint that could result in a determination that a by-pass must be implemented.

(Authority: 20 U.S.C. 1412(f)(2))

§ 300.482 Notice of intent to implement a by-pass.

(a) Before taking any final action to implement a by-pass, the Secretary provides the affected SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed by-pass in sufficient detail to allow the SEA to respond; and

(2) Advises the SEA that it has a specific period of time (at least 45 days) from receipt of the written notice to submit written objections to the proposed by-pass and that it may request in writing the opportunity for a hearing to show cause why a by-pass should not be implemented.

(c) The Secretary sends the notice to the SEA by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3)(A))

§ 300.483 Request to show cause.

An SEA seeking an opportunity to show cause why a by-pass should not be implemented shall submit a written request for a show cause hearing to the Secretary.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.484 Show cause hearing.

(a) If a show cause hearing is requested, the Secretary—

(1) Notifies the SEA and other appropriate public and private school officials of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee must not have had any responsibility for the matter brought for a hearing.

(b) At the show cause hearing, the designee considers matters such as—

(1) The necessity for implementing a by-pass;

(2) Possible factual errors in the written notice of intent to implement a by-pass; and

(3) The objections raised by public and private school representatives.

(c) The designee may regulate the course of the proceedings and the conduct of parties during the pendency of the proceedings. The designee takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order.

(d) The designee may interpret applicable statutes and regulations, but may not waive them or rule on their validity.

(e) The designee arranges for the preparation, retention, and, if appropriate, dissemination of the record of the hearing.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.485 Decision.

(a) The designee who conducts the show cause hearing—

(1) Issues a written decision that includes a statement of findings; and

(2) Submits a copy of the decision to the Secretary and sends a copy to each party by certified mail with return receipt requested.

(b) Each party may submit comments and recommendations on the designee's decision to the Secretary within 15 days of the date the party receives the designee's decision.

(c) The Secretary adopts, reverses, or modifies the designee's decision and notifies the SEA of the Secretary's final action. That notice is sent by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.486 Filing requirements.

(a) Any written submission under §§ 300.482–300.485 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1412(f)(3))

§ 300.487 Judicial review.

If dissatisfied with the Secretary's final action, the SEA may, within 60 days after notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located. The procedures for judicial review are described in section 612(f)(3)(B)-(D) of the Act.

(Authority: 20 U.S.C. 1412(f)(3)(B)-(D))

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 300.500 General responsibility of public agencies; definitions.

(a) *Responsibility of SEA and other public agencies.* Each SEA shall ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§ 300.500-300.529.

(b) *Definitions of "consent," "evaluation," and "personally identifiable."* As used in this part —

(1) *Consent* means that —

(i) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(ii) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(iii)(A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(B) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(2) *Evaluation* means procedures used in accordance with §§ 300.530-300.536 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs; and

(3) *Personally identifiable* means that information includes—

(i) The name of the child, the child's parent, or other family member;

(ii) The address of the child;

(iii) A personal identifier, such as the child's social security number or student number; or

(iv) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415(a))

§ 300.501 Opportunity to examine records; parent participation in meetings.

(a) *General.* The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.562-300.569, an opportunity to—

(1) Inspect and review all education records with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child; and

(2) Participate in meetings with respect to —

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(b) *Parent participation in meetings.* (1) Each public agency shall provide notice consistent with § 300.345(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (a)(2) of this section.

(2) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) *Parent involvement in placement decisions.* (1) Each public agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency shall use procedures consistent with the procedures described in § 300.345(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of the parents, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement, including information that is consistent with the requirements of § 300.345(d).

(5) The public agency shall make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

(Authority: 20 U.S.C. 1414(f), 1415(b)(1))

§ 300.502 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this part—

(i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) *Parent right to evaluation at public expense.* (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) Initiate a hearing under § 300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(c) *Parent-initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1))

§ 300.503 Prior notice by the public agency; content of notice.

(a) *Notice.* (1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(2) If the notice described under paragraph (a)(1) of this section relates to an action proposed by the public agency that also requires parental consent under § 300.505, the agency may give notice at the same time it requests parent consent.

(b) *Content of notice.* The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of any other options that the agency considered and the reasons why those options were rejected;

(4) A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) A description of any other factors that are relevant to the agency's proposal or refusal;

(6) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) Sources for parents to contact to obtain assistance in understanding the provisions of this part.

(c) *Notice in understandable language.* (1) The notice required under paragraph (a) of this section must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency shall take steps to ensure—

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2) (i) and (ii) of this section have been met.

(Authority: 20 U.S.C. 1415(b)(3), (4) and (c), 1414(b)(1))

§ 300.504 Procedural safeguards notice.

(a) *General.* A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, at a minimum—

(1) Upon initial referral for evaluation;

(2) Upon each notification of an IEP meeting;

(3) Upon reevaluation of the child; and

(4) Upon receipt of a request for due process under § 300.507.

(b) *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §§ 300.403, 300.500–300.529, and 300.560–300.577, and the State complaint procedures available under §§ 300.660–300.662 relating to—

(1) Independent educational evaluation;

(2) Prior written notice;

(3) Parental consent;

(4) Access to educational records;

(5) Opportunity to present complaints to initiate due process hearings;

(6) The child's placement during pendency of due process proceedings;

(7) Procedures for students who are subject to placement in an interim alternative educational setting;

(8) Requirements for unilateral placement by parents of children in private schools at public expense;

(9) Mediation;

(10) Due process hearings, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in that State);

(12) Civil actions;

(13) Attorneys' fees; and

(14) The State complaint procedures under §§ 300.660–300.662, including a description of how to file a complaint and the timelines under those procedures.

(c) *Notice in understandable language.* The notice required under paragraph (a) of this section must meet the requirements of § 300.503(c).

(Authority: 20 U.S.C. 1415(d))

§ 300.505 Parental consent.

(a) *General.* (1) Subject to paragraphs (a)(3), (b) and (c) of this section, informed parent consent must be obtained before—

(i) Conducting an initial evaluation or reevaluation; and

(ii) Initial provision of special education and related services to a child with a disability.

(2) Consent for initial evaluation may not be construed as consent for initial placement described in paragraph (a)(1)(ii) of this section.

(3) Parental consent is not required before—

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(b) *Refusal.* If the parents of a child with a disability refuse consent for initial evaluation or a reevaluation, the agency may continue to pursue those evaluations by using the due process procedures under §§ 300.507–300.509, or the mediation procedures under § 300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent.

(c) *Failure to respond to request for reevaluation.* (1) Informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond.

(2) To meet the reasonable measures requirement in paragraph (c)(1) of this section, the public agency must use procedures consistent with those in § 300.345(d).

(d) *Additional State consent requirements.* In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(e) *Limitation.* A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a) and (d) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

(Authority: 20 U.S.C. 1415(b)(3); 1414(a)(1)(C) and (c)(3))

§ 300.506 Mediation.

(a) *General.* Each public agency shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in § 300.503(a)(1) to resolve the disputes through a mediation process that, at a minimum, must be available whenever a hearing is requested under §§ 300.507 or 300.520–300.528.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a due process hearing under § 300.507, or to deny any other rights afforded under Part B of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2)(i) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(ii) If a mediator is not selected on a random (e.g., a rotation) basis from the list described in paragraph (b)(2)(i) of this section, both parties must be involved in selecting the mediator and agree with the selection of the individual who will mediate.

(3) The State shall bear the cost of the mediation process, including the costs of meetings described in paragraph (d) of this section.

(4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

(6) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(c) *Impartiality of mediator.* (1) An individual who serves as a mediator under this part—

(i) May not be an employee of—

(A) Any LEA or any State agency described under § 300.194; or

(B) An SEA that is providing direct services to a child who is the subject of the mediation process; and

(ii) Must not have a personal or professional conflict of interest.

(2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under § 300.194 solely because he or she is paid by the agency to serve as a mediator.

(d) *Meeting to encourage mediation.* (1) A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party—

(i) Who is under contract with a parent training and information center or community parent resource center in the State established under section 682 or 683 of the Act, or an appropriate alternative dispute resolution entity; and

(ii) Who would explain the benefits of the mediation process, and encourage the parents to use the process.

(2) A public agency may not deny or delay a parent's right to a due process hearing under § 300.507 if the parent fails to participate in the meeting described in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1415(e))

§ 300.507 Impartial due process hearing; parent notice.

(a) *General.* (1) A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) When a hearing is initiated under paragraph (a)(1) of this section, the public agency shall inform the parents of the availability of mediation described in § 300.506.

(3) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(i) The parent requests the information; or

(ii) The parent or the agency initiates a hearing under this section.

(b) *Agency responsible for conducting hearing.* The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) *Parent notice to the public agency.* (1) *General.* The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice (which must remain confidential) to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(2) *Content of parent notice.* The notice required in paragraph (c)(1) of this section must include—

(i) The name of the child;

(ii) The address of the residence of the child;

(iii) The name of the school the child is attending;

(iv) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the parents at the time.

(3) *Model form to assist parents.* Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

(4) *Right to due process hearing.* A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.

(Authority: 20 U.S.C. 1415(b)(5), (b)(6), (b)(7), (b)(8), (e)(1) and (f)(1))

§ 300.508 Impartial hearing officer.

(a) A hearing may not be conducted—

(1) By a person who is an employee of the State agency or the LEA that is involved in the education or care of the child; or

(2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(Authority: 20 U.S.C. 1415(f)(3))

§ 300.509 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 300.507 or 300.520–300.528, or an appeal conducted pursuant to § 300.510, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information.* (1) At least 5 business days prior to a hearing conducted pursuant to § 300.507(a), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) *Parental rights at hearings.* (1) Parents involved in hearings must be given the right to—

(i) Have the child who is the subject of the hearing present; and

(ii) Open the hearing to the public.

(2) The record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section must be provided at no cost to parents.

(d) *Findings and decision to advisory panel and general public.* The public agency, after deleting any personally identifiable information, shall —

(1) Transmit the findings and decisions referred to in paragraph (a)(5) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(2) and (h))

§ 300.510 Finality of decision; appeal; impartial review.

(a) *Finality of decision.* A decision made in a hearing conducted pursuant to §§ 300.507 or 300.520–300.528 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.512.

(Authority: 20 U.S.C. 1415(i)(1)(A))

(b) *Appeal of decisions; impartial review.* (1) *General.* If the hearing required by § 300.507 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) *SEA responsibility for review.* If there is an appeal, the SEA shall conduct an impartial review of the hearing. The official conducting the review shall—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.509 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) *Findings and decision to advisory panel and general public.* The SEA, after deleting any personally identifiable information, shall—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under § 300.650; and

(2) Make those findings and decisions available to the public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under § 300.512.

(Authority: 20 U.S.C. 1415(g); H. R. Rep. No. 94–664, at p. 49 (1975))

§ 300.511 Timelines and convenience of hearings and reviews.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415)

§ 300.512 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§ 300.507 or 300.520–300.528 who does not have the right to an appeal under § 300.510(b), and any party aggrieved by the findings and decision under § 300.510(b), has the right to bring a civil action with respect to the complaint presented pursuant to § 300.507. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Shall receive the records of the administrative proceedings;

(2) Shall hear additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

(c) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(d) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 300.507 and 300.510 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2), (i)(3)(A), and 1415(l))

§ 300.513 Attorneys' fees.

(a) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(b)(1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the Act and subpart E of this part.

(2) Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) A court awards reasonable attorney's fees under section 615(i)(3) of the Act consistent with the following:

(1) *Determination of amount of attorneys' fees.* Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(2) *Prohibition of attorneys' fees and related costs for certain services.* (i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if—

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in § 300.506 that is conducted prior to the filing of a request for due process under §§ 300.507 or 300.520–300.528.

(3) *Exception to prohibition on attorneys' fees and related costs.* Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) *Reduction of amount of attorneys' fees.* Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that—

(i) The parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with § 300.507(c).

(5) *Exception to reduction in amount of attorneys' fees.* The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(3)(B)–(G))

§ 300.514 Child's status during proceedings.

(a) Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))

§ 300.515 Surrogate parents.

(a) *General.* Each public agency shall ensure that the rights of a child are protected if—

(1) No parent (as defined in § 300.20) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method—

(1) For determining whether a child needs a surrogate parent; and

(2) For assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Except as provided in paragraph (c)(3) of this section, public agencies shall ensure that a person selected as a surrogate—

(i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no interest that conflicts with the interest of the child he or she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(3) A public agency may select as a surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the standards in

paragraphs (c)(2)(ii) and (iii) of this section.

(d) *Non-employee requirement; compensation.* A person who otherwise qualifies to be a surrogate parent under paragraph (c) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(Authority: 20 U.S.C. 1415(b)(2))

§300.516 [Reserved].

§300.517 Transfer of parental rights at age of majority.

(a) *General.* A State may provide that, when a student with a disability reaches the age of majority under State law that applies to all students (except for a student with a disability who has been determined to be incompetent under State law)—

(1)(i) The public agency shall provide any notice required by this part to both the individual and the parents; and

(ii) All other rights accorded to parents under Part B of the Act transfer to the student; and

(2) All rights accorded to parents under Part B of the Act transfer to students who are incarcerated in an adult or juvenile, State or local correctional institution.

(3) Whenever a State transfers rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency shall notify the individual and the parents of the transfer of rights.

(b) *Special rule.* If, under State law, a State has a mechanism to determine that a student with a disability, who has reached the age of majority under State law that applies to all children and has not been determined incompetent under State law, does not have the ability to provide informed consent with respect to his or her educational program, the State shall establish procedures for appointing the parent, or, if the parent is not available another appropriate individual, to represent the educational interests of the student throughout the student's eligibility under Part B of the Act.

(Authority: 20 U.S.C. 1415(m))

Discipline Procedures

§300.519 Change of placement for disciplinary removals.

For purposes of removals of a child with a disability from the child's current educational placement under §§300.520–300.529, a change of placement occurs if—

(a) The removal is for more than 10 consecutive school days; or

(b) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

(Authority: 20 U.S.C. 1415(k))

§300.520 Authority of school personnel.

(a) School personnel may order—

(1)(i) To the extent removal would be applied to children without disabilities, the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules, and additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.519(b));

(ii) After a child with a disability has been removed from his or her current placement for more than 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under §300.121(d); and

(2) A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if—

(i) The child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency; or

(ii) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(b)(1) Either before or not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change of placement under §300.519, including the action described in paragraph (a)(2) of this section—

(i) If the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in the removal described in paragraph (a) of this section, the agency shall convene an IEP meeting to develop an assessment plan.

(ii) If the child already has a behavioral intervention plan, the IEP team shall meet to review the plan and its implementation, and, modify the plan and its implementation as necessary, to address the behavior.

(2) As soon as practicable after developing the plan described in paragraph (b)(1)(i) of this section, and completing the assessments required by the plan, the LEA shall convene an IEP meeting to develop appropriate behavioral interventions to address that behavior and shall implement those interventions.

(c)(1) If subsequently, a child with a disability who has a behavioral intervention plan and who has been removed from the child's current educational placement for more than 10 school days in a school year is subjected to a removal that does not constitute a change of placement under §300.519, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary.

(2) If one or more of the team members believe that modifications are needed, the team shall meet to modify the plan and its implementation, to the extent the team determines necessary.

(d) For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug*—

(i) Means a controlled substance; but

(ii) Does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Weapon* has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1), (10))

§300.521 Authority of hearing officer.

A hearing officer under section 615 of the Act may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing—

(a) Determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;

(b) Considers the appropriateness of the child's current placement;

(c) Considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(d) Determines that the interim alternative educational setting that is proposed by school personnel who have consulted with the child's special education teacher, meets the requirements of § 300.522(b).

(e) As used in this section, the term *substantial evidence* means beyond a preponderance of the evidence.

(Authority: 20 U.S.C. 1415(k)(2), (10))

§ 300.522 Determination of setting.

(a) *General.* The interim alternative educational setting referred to in § 300.520(a)(2) must be determined by the IEP team.

(b) *Additional requirements.* Any interim alternative educational setting in which a child is placed under §§ 300.520(a)(2) or 300.521 must—

(1) Be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(2) Include services and modifications to address the behavior described in §§ 300.520(a)(2) or 300.521, that are designed to prevent the behavior from recurring.

(Authority: 20 U.S.C. 1415(k)(3))

§ 300.523 Manifestation determination review.

(a) *General.* If an action is contemplated regarding behavior described in §§ 300.520(a)(2) or 300.521, or involving a removal that constitutes a change of placement under § 300.519 for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children—

(1) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and provided the procedural safeguards notice described in § 300.504; and

(2) Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(b) *Individuals to carry out review.* A review described in paragraph (a) of this section must be conducted by the IEP team and other qualified personnel in a meeting.

(c) *Conduct of review.* In carrying out a review described in paragraph (a) of this section, the IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team and other qualified personnel—

(1) First consider, in terms of the behavior subject to disciplinary action, all relevant information, including —

(i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

(ii) Observations of the child; and

(iii) The child's IEP and placement; and

(2) Then determine that—

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(d) *Decision.* If the IEP team and other qualified personnel determine that any of the standards in paragraph (c)(2) of this section were not met, the behavior must be considered a manifestation of the child's disability.

(e) *Meeting.* The review described in paragraph (a) of this section may be conducted at the same IEP meeting that is convened under § 300.520(b).

(f) *Deficiencies in IEP or placement.* If, in the review in paragraphs (b) and (c) of this section, a public agency identifies deficiencies in the child's IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies.

(Authority: 20 U.S.C. 1415(k)(4))

§ 300.524 Determination that behavior was not manifestation of disability.

(a) *General.* If the result of the review described in § 300.523 is a determination, consistent with § 300.523(d), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in § 300.121(d).

(b) *Additional requirement.* If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(c) *Child's status during due process proceedings.* Except as provided in § 300.526, § 300.514 applies if a parent requests a hearing to challenge a determination, made through the review described in § 300.523, that the behavior of the child was not a manifestation of the child's disability.

(Authority: 20 U.S.C. 1415(k)(5))

§ 300.525 Parent appeal.

(a) *General.* (1) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement under §§ 300.520–300.528, the parent may request a hearing.

(2) The State or local educational agency shall arrange for an expedited hearing in any case described in paragraph (a)(1) of this section if a hearing is requested by a parent.

(b) *Review of decision.* (1) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of § 300.523(d).

(2) In reviewing a decision under § 300.520(a)(2) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards in § 300.521.

(Authority: 20 U.S.C. 1415(k)(6))

§ 300.526 Placement during appeals.

(a) *General.* If a parent requests a hearing or an appeal regarding a disciplinary action described in § 300.520(a)(2) or 300.521 to challenge the interim alternative educational setting or the manifestation determination, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in § 300.520(a)(2) or 300.521, whichever occurs first, unless the parent and the State agency or local educational agency agree otherwise.

(b) *Current placement.* If a child is placed in an interim alternative educational setting pursuant to § 300.520(a)(2) or 300.521 and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement the child must remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in paragraph (c) of this section.

(c) *Expedited hearing.* (1) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the LEA may request an expedited due process hearing.

(2) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards in § 300.521.

(3) A placement ordered pursuant to paragraph (c)(2) of this section may not be longer than 45 days.

(4) The procedure in paragraph (c) of this section may be repeated, as necessary.

(Authority: 20 U.S.C. 1415(k)(7))

§ 300.527 Protections for children not yet eligible for special education and related services.

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in §§ 300.520 or 300.521, may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* An LEA must be deemed to have knowledge that a child is a child with a disability if—

(1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services, in accordance with § 300.7;

(3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530–300.536; or

(4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system.

(c) *Exception.* A public agency would not be deemed to have knowledge under paragraph (b) of this section if, as a result of receiving the information specified in that paragraph, the agency—

(1) Either—

(i) Conducted an evaluation under §§ 300.530–300.536, and determined that the child was not a child with a disability under this part; or

(ii) Determined that an evaluation was not necessary; and

(2) Provided notice to the child's parents of its determination under paragraph (c)(1) of this section, consistent with § 300.503.

(d) *Conditions that apply if no basis of knowledge.* (1) *General.* If an LEA does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with paragraph (d)(2) of this section.

(2) *Limitations.* (i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.520 or 300.521, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part, including the requirements of §§ 300.520–300.529 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(8))

§ 300.528 Expedited due process hearings.

(a) Expedited due process hearings under §§ 300.521–300.526 must—

(1) Meet the requirements of § 300.509, except that a State may provide that the time periods identified in §§ 300.509(a)(3) and § 300.509(b) for purposes of expedited due process hearings under §§ 300.521–300.526 are not less than two business days; and

(2) Be conducted by a due process hearing officer who satisfies the requirements of § 300.508.

(b)(1) Each State shall establish a timeline for expedited due process hearings that results in a written decision being mailed to the parties within 45 days of the public agency's receipt of the request for the hearing, without exceptions or extensions.

(2) The timeline established under paragraph (b)(1) of this section must be the same for hearings requested by parents or public agencies.

(c) A State may establish different procedural rules for expedited hearings under §§ 300.521–300.526 than it has established for due process hearings under § 300.507.

(d) The decisions on expedited due process hearings are appealable consistent with § 300.510.

(Authority: 20 U.S.C. 1415(k)(2), (6), (7))

§ 300.529 Referral to and action by law enforcement and judicial authorities.

(a) Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b)(1) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

(Authority: 20 U.S.C. 1415(k)(9))

Procedures for Evaluation and Determination of Eligibility

§ 300.530 General.

Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.531–300.536.

(Authority: 20 U.S.C. 1414(b)(3); 1412(a)(7))

§ 300.531 Initial evaluation.

Each public agency shall conduct a full and individual initial evaluation, in accordance with §§ 300.532 and 300.533, before the initial provision of special education and related services to a child with a disability under Part B of the Act.

(Authority: 20 U.S.C. 1414(a)(1))

§ 300.532 Evaluation procedures.

Each public agency shall ensure, at a minimum, that the following requirements are met:

(a)(1) Tests and other evaluation materials used to assess a child under Part B of the Act—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(ii) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

(2) Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

(b) A variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining—

(1) Whether the child is a child with a disability under § 300.7; and

(2) The content of the child's IEP.

(c)(1) Any standardized tests that are given to a child—

(i) Have been validated for the specific purpose for which they are used; and

(ii) Are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests.

(2) If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration) must be included in the evaluation report.

(d) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(e) Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(f) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.

(g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(h) In evaluating each child with a disability under §§ 300.531–300.536, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(i) The public agency uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(j) The public agency uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

(Authority: 20 U.S.C. 1412(a)(6)(B), 1414(b)(2) and (3))

§ 300.533 Determination of needed evaluation data.

(a) *Review of existing evaluation data.* As part of an initial evaluation (if appropriate) and as part of any reevaluation under Part B of the Act, a group that includes the individuals described in § 300.344, and other qualified professionals, as appropriate, shall—

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based assessments and observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i) Whether the child has a particular category of disability, as described in § 300.7, or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) The present levels of performance and educational needs of the child;

(iii) Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

(b) *Conduct of review.* The group described in paragraph (a) of this section may conduct its review without a meeting.

(c) *Need for additional data.* The public agency shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph (a) of this section.

(d) *Requirements if additional data are not needed.* (1) If the determination under paragraph (a) of this section is that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency shall notify the child's parents—

(i) Of that determination and the reasons for it; and

(ii) Of the right of the parents to request an assessment to determine whether, for purposes of services under this part, the child continues to be a child with a disability.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

(Authority: 20 U.S.C. 1414(c)(1), (2) and (4))

§ 300.534 Determination of eligibility

(a) Upon completing the administration of tests and other evaluation materials—

(1) A group of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in § 300.7; and

(2) The public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent.

(b) A child may not be determined to be eligible under this part if—

(1) The determinant factor for that eligibility determination is—

(i) Lack of instruction in reading or math; or

(ii) Limited English proficiency; and

(2) The child does not otherwise meet the eligibility criteria under § 300.7(a).

(c)(1) A public agency must evaluate a child with a disability in accordance with §§ 300.532 and 300.533 before determining that the child is no longer a child with a disability.

(2) The evaluation described in paragraph (c)(1) of this section is not required before the termination of a student's eligibility under Part B of the Act due to graduation with a regular high school diploma, or exceeding the age eligibility for FAPE under State law.

(Authority: 20 U.S.C. 1414(b)(4) and (5), (c)(5))

§ 300.535 Procedures for determining eligibility and placement.

(a) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.7, and the educational needs of the child, each public agency shall—

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and

(2) Ensure that information obtained from all of these sources is documented and carefully considered.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.340–300.350.

(Authority: 20 U.S.C. 1412(a)(6), 1414(b)(4))

§ 300.536 Reevaluation.

Each public agency shall ensure—

(a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340–300.350; and

(b) That a reevaluation of each child, in accordance with §§ 300.532–300.535, is conducted if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years.

(Authority: 20 U.S.C. 1414(a)(2))

Additional Procedures for Evaluating Children With Specific Learning Disabilities

§ 300.540 Additional team members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.7, must be made by the child's parents and a team of qualified professionals which must include—

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(Authority: Sec. 5(b), Pub. L. 94–142)

§ 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if—

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression.

(ii) Listening comprehension.

(iii) Written expression.

(iv) Basic reading skill.

(v) Reading comprehension.

(vi) Mathematics calculation.

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of—

(1) A visual, hearing, or motor impairment;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(Authority: Sec. 5(b), Pub. L. 94–142)

§ 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(Authority: Sec. 5(b), Pub. L. 94–142)

§ 300.543 Written report.

(a) For a child suspected of having a specific learning disability, the documentation of the team's determination of eligibility, as required by § 300.534(a)(2), must include a statement of—

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(b) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(Authority: Sec. 5(b), Pub. L. 94–142)

Least Restrictive Environment (LRE)

§ 300.550 General LRE requirements.

(a) Except as provided in § 300.311(b) and (c), a State shall demonstrate to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the requirements of §§ 300.550–300.556.

(b) Each public agency shall ensure—

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.26 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or

itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.552 Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.550–300.554;

(b) The child's placement—

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306, each public agency shall ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.554 Children in public or private institutions.

Except as provided in § 300.600(d), an SEA must ensure that § 300.550 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.555 Technical assistance and training activities.

Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.556 Monitoring activities.

(a) The SEA shall carry out activities to ensure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550, the SEA shall—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. 1412(a)(5))

Confidentiality of Information

§ 300.560 Definitions.

As used in §§ 300.560–300.577—

(a) *Destruction* means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

(b) *Education records* means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

(c) *Participating agency* means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act.

(Authority: 20 U.S.C. 1221e–3, 1412(a)(8), 1417(c))

§ 300.561 Notice to parents.

(a) The SEA shall give notice that is adequate to fully inform parents about the requirements of § 300.127, including—

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974 and implementing regulations in 34 CFR part 99.

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §§ 300.507 and 300.521–300.528, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.566 Fees.

(a) Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing under § 300.568.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c))

§ 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must—

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.570 Hearing procedures.

A hearing held under § 300.568 must be conducted according to the procedures under 34 CFR 99.22.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.571 Consent.

(a) Except as to disclosures addressed in § 300.529(b) for which parental consent is not required by Part 99, parental consent must be obtained before personally identifiable information is—

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to 34 CFR part 99 may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99.

(c) The SEA shall provide policies and procedures that are used in the event that a parent refuses to provide consent under this section.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 300.127 and 34 CFR part 99.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.574 Children's rights.

(a) The SEA shall provide policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(b) Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

(c) If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with § 300.517, the rights regarding educational records in §§ 300.562–300.573 must also be transferred to the student. However, the public agency must provide any notice required under section 615 of the Act to the student and the parents.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.575 Enforcement.

The SEA shall provide the policies and procedures, including sanctions, that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

§ 300.576 Disciplinary information.

(a) The State may require that a public agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

(b) The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

(c) If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current individualized education program and any statement of current or previous disciplinary action that has been taken against the child.

(Authority: 20 U.S.C. 1413(j))

§ 300.577 Department use of personally identifiable information.

If the Department or its authorized representatives collect any personally identifiable information regarding children with disabilities that is not subject to 5 U.S.C. 552a (the Privacy Act of 1974), the Secretary applies the requirements of 5 U.S.C. 552a (b)(1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n); and the regulations implementing those provisions in 34 CFR part 5b.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

Department Procedures

§ 300.580 Determination by the Secretary that a State is eligible.

If the Secretary determines that a State is eligible to receive a grant under Part B of the Act, the Secretary notifies the State of that determination.

(Authority: 20 U.S.C. 1412(d))

§ 300.581 Notice and hearing before determining that a State is not eligible.

(a) *General.* (1) The Secretary does not make a final determination that a State is not eligible to receive a grant under Part B of the Act until providing the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.

(2) In implementing paragraph (a)(1)(i) of this section, the Secretary sends a written notice to the SEA by certified mail with return receipt requested.

(b) *Content of notice.* In the written notice described in paragraph (a)(2) of this section, the Secretary—

(1) States the basis on which the Secretary proposes to make a final determination that the State is not eligible;

(2) May describe possible options for resolving the issues;

(3) Advises the SEA that it may request a hearing and that the request for a hearing must be made not later than 30 days after it receives the notice of the proposed final determination that the State is not eligible; and

(4) Provides information about the procedures followed for a hearing.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.582 Hearing official or panel.

(a) If the SEA requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the administration of this program, to conduct a hearing.

(b) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.583 Hearing procedures.

(a) As used in §§ 300.581–300.586 the term *party* or *parties* means the following:

(1) An SEA that requests a hearing regarding the proposed disapproval of the State's eligibility under this part.

(2) The Department official who administers the program of financial assistance under this part.

(3) A person, group or agency with an interest in and having relevant information about the case that has applied for and been granted leave to intervene by the Hearing Official or Panel.

(b) Within 15 days after receiving a request for a hearing, the Secretary designates a Hearing Official or Panel and notifies the parties.

(c) The Hearing Official or Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Hearing Official or Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Hearing Official or Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of the case.

(2) The Hearing Official or Panel may schedule a prehearing conference of the Hearing Official or Panel and parties.

(3) Any party may request the Hearing Official or Panel to schedule a prehearing or other conference. The Hearing Official or Panel decides whether a conference is necessary and notifies all parties.

(4) At a prehearing or other conference, the Hearing Official or Panel and the parties may consider subjects such as—

(i) Narrowing and clarifying issues;

(ii) Assisting the parties in reaching agreements and stipulations;

(iii) Clarifying the positions of the parties;

(iv) Determining whether an evidentiary hearing or oral argument should be held; and

(v) Setting dates for—

(A) The exchange of written documents;

(B) The receipt of comments from the parties on the need for oral argument or evidentiary hearing;

(C) Further proceedings before the Hearing Official or Panel (including an evidentiary hearing or oral argument, if either is scheduled);

(D) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimation of time for each presentation; or

(E) Completion of the review and the initial decision of the Hearing Official or Panel.

(5) A prehearing or other conference held under paragraph (b)(4) of this section may be conducted by telephone conference call.

(6) At a prehearing or other conference, the parties shall be prepared to discuss the subjects listed in paragraph (b)(4) of this section.

(7) Following a prehearing or other conference the Hearing Official or Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(d) The Hearing Official or Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(e) The Hearing Official or Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(f) The Hearing Official or Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Hearing Official or Panel.

(g) The Hearing Official or Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(h) The Hearing Official or Panel may rule on motions and other issues at any stage of the proceedings.

(i) The Hearing Official or Panel may examine witnesses.

(j) The Hearing Official or Panel may set reasonable time limits for submission of written documents.

(k) The Hearing Official or Panel may refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown.

(l) The Hearing Official or Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(m)(1) The parties shall present their positions through briefs and the submission of other documents and may request an oral argument or evidentiary hearing. The Hearing Official or Panel shall determine whether an oral argument or an evidentiary hearing is needed to clarify the positions of the parties.

(2) The Hearing Official or Panel gives each party an opportunity to be represented by counsel.

(n) If the Hearing Official or Panel determines that an evidentiary hearing would materially assist the resolution of the matter, the Hearing Official or Panel gives each party, in addition to the opportunity to be represented by counse—

(1) An opportunity to present witnesses on the party's behalf; and

(2) An opportunity to cross-examine witnesses either orally or with written questions.

(o) The Hearing Official or Panel accepts any evidence that it finds is relevant and material to the proceedings and is not unduly repetitious.

(p)(1) The Hearing Official or Panel—

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the hearing; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(q) Each party shall file with the Hearing Official or Panel all written motions, briefs, and other documents and shall at the same time provide a copy to the other parties to the proceedings.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.584 Initial decision; final decision.

(a) The Hearing Official or Panel prepares an initial written decision that addresses each of the points in the notice sent by the Secretary to the SEA under § 300.581.

(b) The initial decision of a Panel is made by a majority of Panel members.

(c) The Hearing Official or Panel mails by certified mail with return receipt requested a copy of the initial decision to each party (or to the party's counsel) and to the Secretary, with a notice stating that each party has an opportunity to submit written comments regarding the decision to the Secretary.

(d) Each party may file comments and recommendations on the initial decision with the Hearing Official or Panel within 15 days of the date the party receives the Panel's decision.

(e) The Hearing Official or Panel sends a copy of a party's initial comments and recommendations to the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Hearing Official or Panel within seven days of the date the party receives the initial comments and recommendations.

(f) The Hearing Official or Panel forwards the parties' initial and responsive comments on the initial decision to the Secretary who reviews the initial decision and issues a final decision.

(g) The initial decision of the Hearing Official or Panel becomes the final decision of the Secretary unless, within 25 days after the end of the time for receipt of written comments, the Secretary informs the Hearing Official or Panel and the parties to a hearing in writing that the decision is being further reviewed for possible modification.

(h) The Secretary may reject or modify the initial decision of the Hearing Official or Panel if the Secretary finds that it is clearly erroneous.

(i) The Secretary conducts the review based on the initial decision, the written record, the Hearing Official's or Panel's proceedings, and written comments. The Secretary may remand the matter for further proceedings.

(j) The Secretary issues the final decision within 30 days after notifying the Hearing Official or Panel that the initial decision is being further reviewed.

(Authority: 20 U.S.C. (1412(d)(2))

§ 300.585 Filing requirements.

(a) Any written submission under §§ 300.581–300.585 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) The filing date under paragraph (a) of this section is the date the document is—

(1) Hand-delivered;

(2) Mailed; or (3) Sent by facsimile transmission.

(c) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(d) If a document is filed by facsimile transmission, the Secretary, the Hearing Official, or the Panel, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(e) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(Authority: 20 U.S.C. 1413(c))

§ 300.586 Judicial review.

If a State is dissatisfied with the Secretary's final action with respect to the eligibility of the State under section 612 of the Act, the State may, not later than 60 days after notice of that action, file with the United States Court of Appeals for the circuit in which that State is located a petition for review of that action. A copy of the petition must be forthwith transmitted by the clerk of the court to the Secretary. The Secretary then files in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of title 28, United States Code.

(Authority: 20 U.S.C. 1416(b))

§ 300.587 Enforcement.

(a) *General.* The Secretary initiates an action described in paragraph (b) of this section if the Secretary finds—

(1) That there has been a failure by the State to comply substantially with any provision of Part B of the Act, this part, or 34 CFR part 301; or

(2) That there is a failure to comply with any condition of an LEA's or SEA's eligibility under Part B of the Act, this part or 34 CFR part 301, including the terms of any agreement to achieve compliance with Part B of the Act, this part, or Part 301 within the timelines specified in the agreement.

(b) *Types of action.* The Secretary, after notifying the SEA (and any LEA or State agency affected by a failure described in paragraph (a)(2) of this section)—

(1) Withholds in whole or in part any further payments to the State under Part B of the Act;

(2) Refers the matter to the Department of Justice for enforcement; or

(3) Takes any other enforcement action authorized by law.

(c) *Nature of withholding.* (1) If the Secretary determines that it is appropriate to withhold further payments under paragraph (b)(1) of this section, the Secretary may determine that the withholding will be limited to programs or projects, or portions thereof, affected by the failure, or that the SEA shall not make further payments under Part B of the Act to specified LEA or State agencies affected by the failure.

(2) Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of Part B of the Act, this part, or 34 CFR part 301, as specified in paragraph (a) of this section, payments to the State under Part B of the Act are withheld in whole or in part, or payments by the SEA under Part B of the Act are limited to local educational agencies and State agencies whose actions did not cause or were not involved in the failure, as the case may be.

(3) Any SEA, LEA, or other State agency that has received notice under paragraph (a) of this section shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of that agency.

(4) Before withholding under paragraph (b)(1) of this section, the Secretary provides notice and a hearing pursuant to the procedures in §§ 300.581–300.586.

(d) *Referral for appropriate enforcement.* (1) Before the Secretary makes a referral under paragraph (b)(2) of this section for enforcement, or takes any other enforcement action authorized by law under paragraph (b)(3), the Secretary provides the State—

(i) With reasonable notice; and

(ii) With an opportunity for a hearing.

(2) The hearing described in paragraph (d)(1)(ii) of this section consists of an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services to demonstrate why the Department should not make a referral for enforcement.

(e) *Divided State agency responsibility.* For purposes of this part, if responsibility for ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to § 300.600(d), and if the Secretary finds that the failure to comply substantially with the provisions of Part B of the Act or this part are related to a failure by the public agency, the Secretary takes one of the enforcement actions described in paragraph (b) of this section to ensure compliance with Part B of the Act and this part, except—

(1) Any reduction or withholding of payments to the State under paragraph (b)(1) of this section is proportionate to the total funds allotted under section 611 of the Act to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the State educational agency; and

(2) Any withholding of funds under paragraph (e)(1) of this section is limited to the specific agency responsible for the failure to comply with Part B of the Act or this part.

(Authority: 20 U.S.C. 1416)

§§ 300.588 [Reserved]

§ 300.589 Waiver of requirement regarding supplementing and not supplanting with Part B funds.

(a) Except as provided under §§ 300.232–300.235, funds paid to a State under Part B of the Act must be used to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of SEAs or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant those Federal, State, and local funds. A State may use funds it retains under § 300.602 without regard to the prohibition on supplanting other funds (see § 300.372).

(b) If a State provides clear and convincing evidence that all eligible children with disabilities throughout the State have FAPE available to them, the Secretary may waive for a period of one year in whole or in part the requirement under § 300.153 (regarding State-level nonsupplanting) if the Secretary concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver under this section, it must submit to the Secretary a written request that includes—

(1) An assurance that FAPE is currently available, and will remain available throughout the period that a waiver would be in effect, to all eligible children with disabilities throughout the State, regardless of the public agency that is responsible for providing FAPE to them. The assurance must be signed by an official who has the authority to provide that assurance as it applies to all eligible children with disabilities in the State;

(2) All evidence that the State wishes the Secretary to consider in determining whether all eligible children with disabilities have FAPE available to them, setting forth in detail—

(i) The basis on which the State has concluded that FAPE is available to all eligible children in the State; and

(ii) The procedures that the State will implement to ensure that FAPE remains available to all eligible children in the State, which must include—

(A) The State's procedures under § 300.125 for ensuring that all eligible children are identified, located and evaluated;

(B) The State's procedures for monitoring public agencies to ensure that they comply with all requirements of this part;

(C) The State's complaint procedures under §§ 300.660–300.662; and

(D) The State's hearing procedures under §§ 300.507–300.511 and 300.520–300.528;

(3) A summary of all State and Federal monitoring reports, and State complaint decisions (see §§ 300.660–300.662) and hearing decisions (see §§ 300.507–300.511 and 300.520–300.528), issued within three years prior to the date of the State's request for a waiver under this section, that includes any finding that FAPE has not been available to one or more eligible children, and evidence that FAPE is now available to all children addressed in those reports or decisions; and

(4) Evidence that the State, in determining that FAPE is currently available to all eligible children with disabilities in the State, has consulted with the State advisory panel under § 300.650, the State's parent training and information center or centers, the State's protection and advocacy organization, and other organizations representing the interests of children with disabilities and their parents, and a summary of the input of these organizations.

(d) If the Secretary determines that the request and supporting evidence submitted by the State makes a prima facie showing that FAPE is, and will remain, available to all eligible children with disabilities in the State, the Secretary, after notice to the public throughout the State, conducts a public hearing at which all interested persons and organizations may present evidence regarding the following issues:

(1) Whether FAPE is currently available to all eligible children with disabilities in the State.

(2) Whether the State will be able to ensure that FAPE remains available to all eligible children with disabilities in

the State if the Secretary provides the requested waiver.

(e) Following the hearing, the Secretary, based on all submitted evidence, will provide a waiver, in whole or in part, for a period of one year if the Secretary finds that the State has provided clear and convincing evidence that FAPE is currently available to all eligible children with disabilities in the State, and the State will be able to ensure that FAPE remains available to all eligible children with disabilities in the State if the Secretary provides the requested waiver.

(f) A State may receive a waiver of the requirement of section 612(a)(19)(A) and § 300.154(a) if it satisfies the requirements of paragraphs (b) through (e) of this section.

(g) The Secretary may grant subsequent waivers for a period of one year each, if the Secretary determines that the State has provided clear and convincing evidence that all eligible children with disabilities throughout the State have, and will continue to have throughout the one-year period of the waiver, FAPE available to them.

(Authority: 20 U.S.C. 1412(a)(18)(C), (19)(C)(ii) and (E))

Subpart F—State Administration

General

§ 300.600 Responsibility for all educational programs.

(a) The SEA is responsible for ensuring—

(1) That the requirements of this part are carried out; and

(2) That each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency—

(i) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA; and

(ii) Meets the education standards of the SEA (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(c) Part B of the Act does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

(d) Notwithstanding paragraph (a) of this section, the Governor (or another individual pursuant to State law) may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(Authority: 20 U.S.C. 1412(a)(11))

§ 300.601 Relation of Part B to other Federal programs.

Part B of the Act may not be construed to permit a State to reduce medical and other assistance available to children with disabilities, or to alter the eligibility of a child with a disability, under title V (Maternal and Child Health) or title XIX (Medicaid) of the Social Security Act, to receive services that are also part of FAPE.

(Authority: 20 U.S.C. 1412(e))

§ 300.602 State-level activities.

(a) Each State may retain not more than the amount described in paragraph (b) of this section for administration in accordance with §§ 300.620 and 300.621 and other State-level activities in accordance with § 300.370.

(b) For each fiscal year, the Secretary determines and reports to the SEA an amount that is 25 percent of the amount the State received under this section for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of—

(1) The percentage increase, if any, from the preceding fiscal year in the State's allocation under section 611 of the Act; or

(2) The rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1411(f)(1)(A) and (B))

Use of Funds

§ 300.620 Use of funds for State administration.

(a) For the purpose of administering Part B of the Act, including section 619 of the Act (including the coordination of activities under Part B of the Act with, and providing technical assistance to, other programs that provide services to children with disabilities)—

(1) Each State may use not more than twenty percent of the maximum amount it may retain under § 300.602(a) for any fiscal year or $500,000 (adjusted by the cumulative rate of inflation since fiscal year 1998, as measured by the percentage increase, if any, in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), whichever is greater; and

(2) Each outlying area may use up to five percent of the amount it receives under this section for any fiscal year or $35,000, whichever is greater.

(b) Funds described in paragraph (a) of this section may also be used for the administration of Part C of the Act, if the SEA is the lead agency for the State under that part.

(Authority: 20 U.S.C. 1411(f)(2))

§ 300.621 Allowable costs.

(a) The SEA may use funds under § 300.620 for—

(1) Administration of State activities under Part B of the Act and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of children with disabilities;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of children with disabilities;

(3) Technical assistance to LEAs with respect to the requirements of Part B of the Act;

(4) Leadership services for the program supervision and management of special education activities for children with disabilities; and

(5) Other State leadership activities and consultative services.

(b) The SEA shall use the remainder of its funds under § 300.620 in accordance with § 300.370.

(Authority: 20 U.S.C. 1411(f)(2))

§ 300.622 Subgrants to LEAs for capacity-building and improvement.

In any fiscal year in which the percentage increase in the State's allocation under 611 of the Act exceeds the rate of inflation (as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), each State shall reserve, from its allocation under 611 of the Act, the amount described in § 300.623 to make subgrants to LEAs, unless that amount is less than $100,000, to assist them in providing direct services and in making systemic change to improve results for children with disabilities through one or more of the following:

(a) Direct services, including alternative programming for children who have been expelled from school, and services for children in correctional facilities, children enrolled in State-operated or State-supported schools, and children in charter schools.

(b) Addressing needs or carrying out improvement strategies identified in the

State's Improvement Plan under subpart 1 of Part D of the Act.

(c) Adopting promising practices, materials, and technology, based on knowledge derived from education research and other sources.

(d) Establishing, expanding, or implementing interagency agreements and arrangements between LEAs and other agencies or organizations concerning the provision of services to children with disabilities and their families.

(e) Increasing cooperative problem-solving between parents and school personnel and promoting the use of alternative dispute resolution.

(Authority: 20 U.S.C. 1411(f)(4)(A))

§ 300.623 Amount required for subgrants to LEAs.

For each fiscal year, the amount referred to in § 300.622 is—

(a) The maximum amount the State was allowed to retain under § 300.602(a) for the prior fiscal year, or, for fiscal year 1998, 25 percent of the State's allocation for fiscal year 1997 under section 611; multiplied by

(b) The difference between the percentage increase in the State's allocation under this section and the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(Authority: 20 U.S.C. 1411(f)(4)(B))

§ 300.624 State discretion in awarding subgrants.

The State may establish priorities in awarding subgrants under § 300.622 to LEAs competitively or on a targeted basis.

(Authority: 20 U.S.C. 1411(f)(4)(A))

State Advisory Panel

§ 300.650 Establishment of advisory panels.

(a) Each State shall establish and maintain, in accordance with §§ 300.650–300.653, a State advisory panel on the education of children with disabilities.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 300.652, the State may modify the existing panel so that it fulfills all of the requirements of §§ 300.650–300.653, instead of establishing a new advisory panel.

(Authority: 20 U.S.C. 1412(a)(21)(A))

§ 300.651 Membership.

(a) *General.* The membership of the State advisory panel must consist of members appointed by the Governor, or any other official authorized under State law to make these appointments, that is representative of the State population and that is composed of individuals involved in, or concerned with the education of children with disabilities, including—

(1) Parents of children with disabilities;

(2) Individuals with disabilities;

(3) Teachers;

(4) Representatives of institutions of higher education that prepare special education and related services personnel;

(5) State and local education officials;

(6) Administrators of programs for children with disabilities;

(7) Representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(8) Representatives of private schools and public charter schools;

(9) At least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; and

(10) Representatives from the State juvenile and adult corrections agencies.

(b) *Special rule.* A majority of the members of the panel must be individuals with disabilities or parents of children with disabilities.

(Authority: 20 U.S.C. 1412(a)(21)(B) and (C))

§ 300.652 Advisory panel functions.

(a) *General.* The State advisory panel shall—

(1) Advise the SEA of unmet needs within the State in the education of children with disabilities;

(2) Comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(3) Advise the SEA in developing evaluations and reporting on data to the Secretary under section 618 of the Act;

(4) Advise the SEA in developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act; and

(5) Advise the SEA in developing and implementing policies relating to the coordination of services for children with disabilities.

(b) *Advising on eligible students with disabilities in adult prisons.* The advisory panel also shall advise on the education of eligible students with disabilities who have been convicted as adults and incarcerated in adult prisons, even if, consistent with § 300.600(d), a State assigns general supervision responsibility for those students to a public agency other than an SEA.

(Authority: 20 U.S.C. 1412(a)(21)(D))

§ 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the SEA. This report must be made available to the public in a manner consistent with other public reporting requirements of Part B of the Act.

(c) Official minutes must be kept on all panel meetings and must be made available to the public on request.

(d) All advisory panel meetings and agenda items must be announced enough in advance of the meeting to afford interested parties a reasonable opportunity to attend. Meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 300.620 for this purpose.

(Authority: 20 U.S.C. 1412(a)(21))

State Complaint Procedures

§ 300.660 Adoption of State complaint procedures.

(a) *General.* Each SEA shall adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of § 300.662 by—

(i) Providing for the filing of a complaint with the SEA; and

(ii) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 300.660–300.662.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which it has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address:

(1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and

(2) Appropriate future provision of services for all children with disabilities.

(Authority: 20 U.S.C. 1221e-3)

§ 300.661 Minimum State complaint procedures.

(a) *Time limit; minimum procedures.* Each SEA shall include in its complaint procedures a time limit of 60 days after a complaint is filed under § 300.660(a) to—

(1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the SEA's final decision.

(b) *Time extension; final decision; implementation.* The SEA's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(2) Include procedures for effective implementation of the SEA's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section, and due process hearings under §§ 300.507 and 300.520–300.528.* (1) If a written complaint is received that is also the subject of a due process hearing under § 300.507 or §§ 300.520–300.528, or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.

(2) If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties—

(i) The hearing decision is binding; and

(ii) The SEA must inform the complainant to that effect.

(3) A complaint alleging a public agency's failure to implement a due process decision must be resolved by the SEA.

(Authority: 20 U.S.C. 1221e-3)

§ 300.662 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§ 300.660–300.661.

(b) The complaint must include—

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part; and

(2) The facts on which the statement is based.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 300.660(a) unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received under § 300.660(a).

(Authority: 20 U.S.C. 1221e-3)

Subpart G—Allocation of Funds; Reports

Allocations

§ 300.700 Special definition of the term "State".

For the purposes of §§ 300.701, and 300.703–300.714, the term *State* means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 1411(h)(2))

§ 300.701 Grants to States.

(a) *Purpose of grants.* The Secretary makes grants to States and the outlying areas and provides funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with Part B of the Act.

(b) *Maximum amounts.* The maximum amount of the grant a State may receive under section 611 of the Act for any fiscal year is—

(1) The number of children with disabilities in the State who are receiving special education and related services—

(i) Aged 3 through 5 if the State is eligible for a grant under section 619 of the Act; and

(ii) Aged 6 through 21; multiplied by—

(2) Forty (40) percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. 1411(a))

§ 300.702 Definition.

For the purposes of this section the term *average per-pupil expenditure in public elementary and secondary schools in the United States* means—

(a) Without regard to the source of funds—

(1) The aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all LEAs in the 50 States and the District of Columbia); plus

(2) Any direct expenditures by the State for the operation of those agencies; divided by

(b) The aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(Authority: 20 U.S.C. 1411(h)(1))

§ 300.703 Allocations to States.

(a) *General.* After reserving funds for studies and evaluations under section 674(e) of the Act, and for payments to the outlying areas, the freely associated States, and the Secretary of the Interior under §§ 300.715 and 300.717–300.719, the Secretary allocates the remaining amount among the States in accordance with paragraph (b) of this section and §§ 300.706–300.709.

(b) *Interim formula.* Except as provided in §§ 300.706–300.709, the Secretary allocates the amount described in paragraph (a) of this section among the States in accordance with section 611(a)(3), (4), (5) and (b)(1), (2) and (3) of the Act, as in effect prior to June 4, 1997, except that the determination of the number of children with disabilities receiving special education and related services under section 611(a)(3) of the Act (as then in effect) may be calculated as of December 1, or, at the State's discretion, the last

Friday in October, of the fiscal year for which the funds were appropriated.

(Authority: 20 U.S.C. 1411(d))

§§ 300.704–300.705 [Reserved]

§ 300.706 Permanent formula.

(a) *Establishment of base year.* The Secretary allocates the amount described in § 300.703(a) among the States in accordance with §§ 300.706–300.709 for each fiscal year beginning with the first fiscal year for which the amount appropriated under 611(j) of the Act is more than $4,924,672,200.

(b) *Use of base year.* (1) *Definition.* As used in this section, the term *base year* means the fiscal year preceding the first fiscal year in which this section applies.

(2) *Special rule for use of base year amount.* If a State received any funds under section 611 of the Act for the base year on the basis of children aged 3 through 5, but does not make FAPE available to all children with disabilities aged 3 through 5 in the State in any subsequent fiscal year, the Secretary computes the State's base year amount, solely for the purpose of calculating the State's allocation in that subsequent year under §§ 300.707–300.709, by subtracting the amount allocated to the State for the base year on the basis of those children.

(Authority: 20 U.S.C. 1411(e)(1) and (2))

§ 300.707 Increase in funds.

If the amount available for allocations to States under § 300.706 is equal to or greater than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) Except as provided in § 300.708, the Secretary—

(1) Allocates to each State the amount it received for the base year;

(2) Allocates 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of FAPE under Part B of the Act; and

(3) Allocates 15 percent of those remaining funds to States on the basis of their relative populations of children described in paragraph (a)(2) of this section who are living in poverty.

(b) For the purpose of making grants under this section, the Secretary uses the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(Authority: 20 U.S.C. 1411(e)(3))

§ 300.708 Limitation.

(a) Allocations under § 300.707 are subject to the following:

(1) No State's allocation may be less than its allocation for the preceding fiscal year.

(2) No State's allocation may be less than the greatest of—

(i) The sum of—

(A) The amount it received for the base year; and

(B) One-third of one percent of the amount by which the amount appropriated under section 611(j) of the Act exceeds the amount appropriated under section 611 of the Act for the base year; or

(ii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

(iii) The sum of—

(A) The amount it received for the preceding fiscal year; and

(B) That amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

(b) Notwithstanding paragraph (a)(2) of this section, no State's allocation under § 300.707 may exceed the sum of—

(1) The amount it received for the preceding fiscal year; and

(2) That amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.

(c) If the amount available for allocations to States under § 300.703 and paragraphs (a) and (b) of this section is insufficient to pay those allocations in full those allocations are ratably reduced, subject to paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 1411(e)(3)(B) and (C))

§ 300.709 Decrease in funds.

If the amount available for allocations to States under § 300.706 is less than the amount allocated to the States under section 611 of the Act for the preceding fiscal year, those allocations are calculated as follows:

(a) If the amount available for allocations is greater than the amount allocated to the States for the base year, each State is allocated the sum of—

(1) The amount it received for the base year; and

(2) An amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over the base year bears to the total of those increases for all States.

(b)(1) If the amount available for allocations is equal to or less than the amount allocated to the States for the base year, each State is allocated the amount it received for the base year.

(2) If the amount available is insufficient to make the allocations described in paragraph (b)(1) of this section, those allocations are ratably reduced.

(Authority: 20 U.S.C. 1411(e)(4))

§ 300.710 Allocation for State in which by-pass is implemented for private school children with disabilities.

In determining the allocation under §§ 300.700–300.709 of a State in which the Secretary will implement a by-pass for private school children with disabilities under §§ 300.451–300.487, the Secretary includes in the State's child count—

(a) For the first year of a by-pass, the actual or estimated number of private school children with disabilities (as defined in §§ 300.7(a) and 300.450) in the State, as of the preceding December 1; and

(b) For succeeding years of a by-pass, the number of private school children with disabilities who received special education and related services under the by-pass in the preceding year.

(Authority: 20 U.S.C. 1412(f)(2))

§ 300.711 Subgrants to LEAs.

Each State that receives a grant under section 611 of the Act for any fiscal year shall distribute in accordance with § 300.712 any funds it does not retain under § 300.602 and is not required to distribute under §§ 300.622 and 300.623 to LEAs in the State that have established their eligibility under section 613 of the Act, and to State agencies that received funds under section 614A(a) of the Act for fiscal year 1997, as then in effect, and have established their eligibility under section 613 of the Act, for use in accordance with Part B of the Act.

(Authority: 20 U.S.C. 1411(g)(1))

§ 300.712 Allocations to LEAs.

(a) *Interim procedure.* For each fiscal year for which funds are allocated to States under § 300.703(b) each State shall allocate funds under § 300.711 in accordance with section 611(d) of the Act, as in effect prior to June 4, 1997.

(b) *Permanent procedure.* For each fiscal year for which funds are allocated to States under §§ 300.706–300.709, each State shall allocate funds under § 300.711 as follows:

(1) *Base payments.* The State first shall award each agency described in § 300.711 the amount that agency would have received under this section for the

base year, as defined in § 300.706(b)(1), if the State had distributed 75 percent of its grant for that year under section § 300.703(b).

(2) *Base payment adjustments.* For any fiscal year after the base year fiscal year—

(i) If a new LEA is created, the State shall divide the base allocation determined under paragraph (b)(1) of this section for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under § 300.706(b)(2), currently provided special education by each of the LEAs;

(ii) If one or more LEAs are combined into a single new LEA, the State shall combine the base allocations of the merged LEAs; and

(iii) If, for two or more LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages 3 through 21 change, the base allocations of affected LEAs shall be redistributed among affected LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 if a State has had its payment reduced under § 300.706(b)(2), currently provided special education by each affected LEA.

(3) *Allocation of remaining funds.* The State then shall—

(i) Allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within each agency's jurisdiction; and

(ii) Allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the SEA.

(iii) For the purposes of making grants under this section, States must apply on a uniform basis across all LEAs the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.

(Authority: 20 U.S.C. 1411(g)(2))

§ 300.713 Former Chapter 1 State agencies.

(a) To the extent necessary, the State—

(1) Shall use funds that are available under § 300.602(a) to ensure that each State agency that received fiscal year 1994 funds under subpart 2 of Part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect in fiscal year 1994) receives, from the combination of funds under § 300.602(a) and funds provided under § 300.711, an amount no less than—

(i) The number of children with disabilities, aged 6 through 21, to whom the agency was providing special education and related services on December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated, subject to the limitation in paragraph (b) of this section; multiplied by

(ii) The per-child amount provided under that subpart for fiscal year 1994; and

(2) May use funds under § 300.602(a) to ensure that each LEA that received fiscal year 1994 funds under that subpart for children who had transferred from a State-operated or State-supported school or program assisted under that subpart receives, from the combination of funds available under § 300.602(a) and funds provided under § 300.711, an amount for each child, aged 3 through 21 to whom the agency was providing special education and related services on December 1, or, at the State's discretion, the last Friday in October, of the fiscal year for which the funds were appropriated, equal to the per-child amount the agency received under that subpart for fiscal year 1994.

(b) The number of children counted under paragraph (a)(1)(i) of this section may not exceed the number of children aged 3 through 21 for whom the agency received fiscal year 1994 funds under subpart 2 of Part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in effect in fiscal year 1994).

(Authority: 20 U.S.C. 1411(g)(3))

§ 300.714 Reallocation of LEA funds.

If an SEA determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the SEA may reallocate any portion of the funds under Part B of the Act that are not needed by that local agency to provide FAPE to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas they serve.

(Authority: 20 U.S.C. 1411(g)(4))

§ 300.715 Payments to the Secretary of the Interior for the education of Indian children.

(a) *Reserved amounts for Secretary of Interior.* From the amount appropriated for any fiscal year under 611(j) of the Act, the Secretary reserves 1.226 percent to provide assistance to the Secretary of the Interior in accordance with this section and § 300.716.

(b) *Provision of amounts for assistance.* The Secretary provides amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of the payment for any fiscal year is equal to 80 percent of the amount allotted under paragraph (a) of this section for that fiscal year.

(c) *Calculation of number of children.* In the case of Indian students aged 3 to 5, inclusive, who are enrolled in programs affiliated with the Bureau of Indian Affairs (BIA) schools and that are required by the States in which these schools are located to attain or maintain State accreditation, and which schools have this accreditation prior to the date of enactment of the Individuals with Disabilities Education Act Amendments of 1991, the school may count those children for the purpose of distribution of the funds provided under this section to the Secretary of the Interior.

(d) *Responsibility for meeting the requirements of Part B.* The Secretary of the Interior shall meet all of the requirements of Part B of the Act for the children described in paragraphs (b) and (c) of this section, in accordance with § 300.260.

(Authority: 20 U.S.C. 1411(c); 1411(i)(1)(A) and (B))

§ 300.716 Payments for education and services for Indian children with disabilities aged 3 through 5.

(a) *General.* With funds appropriated under 611(j) of the Act, the Secretary makes payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act) or consortia of those tribes or tribal organizations to provide for the coordination of assistance for special education and related services for children with disabilities aged 3 through 5 on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of the payments under paragraph (b) of this section for any fiscal year is equal to 20 percent of the amount allotted under § 300.715(a).

(b) *Distribution of funds.* The Secretary of the Interior shall distribute the total amount of the payment under paragraph (a) of this section by allocating to each tribe or tribal organization an amount based on the number of children with disabilities ages 3 through 5 residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations.

(c) *Submission of information.* To receive a payment under this section, the tribe or tribal organization shall submit the figures to the Secretary of the Interior as required to determine the amounts to be allocated under paragraph (b) of this section. This information must be compiled and submitted to the Secretary.

(d) *Use of funds.* (1) The funds received by a tribe or tribal organization must be used to assist in child find, screening, and other procedures for the early identification of children aged 3 through 5, parent training, and the provision of direct services. These activities may be carried out directly or through contracts or cooperative agreements with the BIA, LEAs, and other public or private nonprofit organizations. The tribe or tribal organization is encouraged to involve Indian parents in the development and implementation of these activities.

(2) The entities shall, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(e) *Biennial report.* To be eligible to receive a grant pursuant to paragraph (a) of this section, the tribe or tribal organization shall provide to the Secretary of the Interior a biennial report of activities undertaken under this paragraph, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the two years following the one in which the report is made. The Secretary of the Interior shall include a summary of this information on a biennial basis in the report to the Secretary required under section 611(i) of the Act. The Secretary may require any additional information from the Secretary of the Interior.

(f) *Prohibitions.* None of the funds allocated under this section may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(Authority: 20 U.S.C. 1411(i)(3))

§ 300.717 Outlying areas and freely associated States.

From the amount appropriated for any fiscal year under section 611(j) of the Act, the Secretary reserves not more than one percent, which must be used—

(a) To provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and

(b) For fiscal years 1998 through 2001, to carry out the competition described in § 300.719, except that the amount reserved to carry out that competition may not exceed the amount reserved for fiscal year 1996 for the competition under Part B of the Act described under the heading "SPECIAL EDUCATION" in Public Law 104-134.

(Authority: 20 U.S.C. 1411(b)(1))

§ 300.718 Outlying area—definition.

As used in this part, the term outlying area means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1402(18))

§ 300.719 Limitation for freely associated States.

(a) *Competitive grants.* The Secretary uses funds described in § 300.717(b) to award grants, on a competitive basis, to Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States to carry out the purposes of this part.

(b) *Award basis.* The Secretary awards grants under paragraph (a) of this section on a competitive basis, pursuant to the recommendations of the Pacific Region Educational Laboratory in Honolulu, Hawaii. Those recommendations must be made by experts in the field of special education and related services.

(c) *Assistance requirements.* Any freely associated State that wishes to receive funds under Part B of the Act shall include, in its application for assistance—

(1) Information demonstrating that it will meet all conditions that apply to States under Part B of the Act;

(2) An assurance that, notwithstanding any other provision of Part B of the Act, it will use those funds only for the direct provision of special education and related services to children with disabilities and to enhance its capacity to make FAPE available to all children with disabilities;

(3) The identity of the source and amount of funds, in addition to funds under Part B of the Act, that it will make available to ensure that FAPE is available to all children with disabilities within its jurisdiction; and

(4) Such other information and assurances as the Secretary may require.

(d) *Termination of eligibility.* Notwithstanding any other provision of law, the freely associated States may not receive any funds under Part B of the Act for any program year that begins after September 30, 2001.

(e) *Administrative costs.* The Secretary may provide not more than five percent of the amount reserved for grants under this section to pay the administrative costs of the Pacific Region Educational Laboratory under paragraph (b) of this section.

(f) *Eligibility for award.* An outlying area is not eligible for a competitive award under § 300.719 unless it receives assistance under § 300.717(a).

(Authority: 20 U.S.C. 1411(b)(2) and (3))

§ 300.720 Special rule.

The provisions of Public Law 95-134, permitting the consolidation of grants by the outlying areas, do not apply to funds provided to those areas or to the freely associated States under Part B of the Act.

(Authority: 20 U.S.C. 1411(b)(4))

§ 300.721 [Reserved]

§ 300.722 Definition.

As used in this part, the term *freely associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(Authority: 20 U.S.C. 1411(b)(6))

Reports

§ 300.750 Annual report of children served—report requirement.

(a) The SEA shall report to the Secretary no later than February 1 of each year the number of children with disabilities aged 3 through 21 residing in the State who are receiving special education and related services.

(b) The SEA shall submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1411(d)(2); 1418(a))

§ 300.751 Annual report of children served—information required in the report.

(a) For any year the SEA shall include in its report a table that shows the number of children with disabilities receiving special education and related services on December 1, or at the State's discretion on the last Friday in October, of that school year—

(1) Aged 3 through 5;

(2) Aged 6 through 17; and

(3) Aged 18 through 21.

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1, or, at the State's discretion, the last Friday in October.

(c) Reports must also include the number of those children with disabilities aged 3 through 21 for each year of age (3, 4, 5, etc.) within each disability category, as defined in the definition of "children with disabilities" in § 300.7; and

(d) The Secretary may permit the collection of the data in paragraph (c) of this section through sampling.

(e) The SEA may not report a child under paragraph (c) of this section under more than one disability category.

(f) If a child with a disability has more than one disability, the SEA shall report that child under paragraph (c) of this section in accordance with the following procedure:

(1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness".

(2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities".

(Authority: 20 U.S.C. 1411(d)(2); 1418(a) and (b))

§ 300.752 Annual report of children served—certification.

The SEA shall include in its report a certification signed by an authorized official of the agency that the information provided under § 300.751(a) is an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

§ 300.753 Annual report of children served—criteria for counting children.

(a) The SEA may include in its report children with disabilities who are enrolled in a school or program that is operated or supported by a public agency, and that—

(1) Provides them with both special education and related services that meet State standards;

(2) Provides them only with special education, if a related service is not required, that meets State standards; or

(3) In the case of children with disabilities enrolled by their parents in private schools, provides them with special education or related services under §§ 300.452–300.462 that meet State standards.

(b) The SEA may not include children with disabilities in its report who are receiving special education funded solely by the Federal Government, including children served by the Department of Interior, the Department of Defense, or the Department of Education. However, the State may count children covered under § 300.184(c)(2).

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

§ 300.754 Annual report of children served—other responsibilities of the SEA.

In addition to meeting the other requirements of §§ 300.750–300.753, the SEA shall—

(a) Establish procedures to be used by LEAs and other educational institutions in counting the number of children with disabilities receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the SEA to ensure that the State complies with § 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under §§ 300.750–300.753; and

(e) Ensure that documentation is maintained that enables the State and the Secretary to audit the accuracy of the count.

(Authority: 20 U.S.C. 1411(d)(2); 1417(b))

§ 300.755 Disproportionality.

(a) *General.* Each State that receives assistance under Part B of the Act, and the Secretary of the Interior, shall provide for the collection and examination of data to determine if significant disproportionality based on race is occurring in the State or in the schools operated by the Secretary of the Interior with respect to—

(1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act; and

(2) The placement in particular educational settings of these children.

(b) *Review and revision of policies, practices, and procedures.* In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (a) of this section, the State or the Secretary of the Interior shall provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of Part B of the Act.

(Authority: 20 U.S.C. 1418(c))

§ 300.756 Acquisition of equipment; construction or alteration of facilities.

(a) *General.* If the Secretary determines that a program authorized under Part B of the Act would be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary may allow the use of those funds for those purposes.

(b) *Compliance with certain regulations.* Any construction of new facilities or alteration of existing facilities under paragraph (a) of this section must comply with the requirements of—

(1) Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the "Americans with Disabilities Accessibility Guidelines for Buildings and Facilities"); or

(2) Appendix A of part 101–19.6 of title 41, Code of Federal Regulations (commonly known as the "Uniform Federal Accessibility Standards").

(Authority: 20 U.S.C. 1405)

Appendix A to Part 300—Notice of Interpretation

I. Involvement and Progress of Each Child With a Disability in the General Curriculum

1. What are the major Part B IEP requirements that govern the involvement and progress of children with disabilities in the general curriculum?

2. Must a child's IEP address his or her involvement in the general curriculum, regardless of the nature and severity of the child's disability and the setting in which the child is educated?

3. What must public agencies do to meet the requirements at §§ 300.344(a)(2) and 300.346(d) regarding the participation of a "regular education teacher" in the development review, and revision of the IEPs, for children age 3 through 5 who are receiving special education and related services?

4. Must the measurable annual goals in a child's IEP address all areas of the general curriculum, or only those areas in which the child's involvement and progress are affected by the child's disability?

II. Involvement of Parents and Students

5. What is the role of the parents, including surrogate parents, in decisions regarding the educational program of their children?

6. What are the Part B requirements regarding the participation of a student (child) with a disability in an IEP meeting?

7. Must the public agency inform the parents of who will be at the IEP meeting?

8. Do parents have the right to a copy of their child's IEP?

9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP?

10. Does Part B require that public agencies inform parents regarding the educational progress of their children with disabilities?

III. Preparing Students With Disabilities for Employment and Other Post-School Experiences

11. What must the IEP team do to meet the requirements that the IEP include a statement of "transition service needs" beginning at age 14 (§ 300.347(b)(1), and a statement of "needed transition services" beginning at age 16 (§ 300.347(b)(2)?

12. Must the IEP for each student with a disability, beginning no later than age 16, include all "needed transition services," as identified by the IEP team and consistent with the definition at § 300.29, even if an agency other than the public agency will provide those services? What is the public agency's responsibility if another agency fails to provide agreed-upon transition services?

13. Under what circumstances must a public agency invite representatives from other agencies to an IEP meeting at which a child's need for transition services will be considered?

IV. Other Questions Regarding Implementation of Idea

14. For a child with a disability receiving special education for the first time, when must an IEP be developed—before placement or after placement?

15. Who is responsible for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA?

16. For a child placed out of State by an educational or non-educational State or local agency, is the placing or receiving State responsible for the child's IEP?

17. If a disabled child has been receiving special education from one public agency and transfers to another public agency in the same State, must the new public agency develop an IEP before the child can be placed in a special education program?

18. What timelines apply to the development and implementation of an initial IEP for a child with a disability?

19. Must a public agency hold separate meetings to determine a child's eligibility for special education and related services, develop the child's IEP, and determine the child's placement, or may the agency meet all of these requirements in a single meeting?

20. How frequently must a public agency conduct meetings to review, and if appropriate revise, the IEP for each child with a disability?

21. May IEP meetings be audio or video-tape-recorded?

22. Who can serve as the representative of the public agency at an IEP meeting?

23. For a child with a disability being considered for initial placement in special education, which teacher or teachers should attend the IEP meeting?

24. What is the role of a regular education teacher in the development, review, and revision of the IEP for a child who is, or may be, participating in the regular education environment?

25. If a child with a disability attends several regular classes, must all of the child's regular education teachers be members of the child's IEP team?

26. How should a public agency determine which regular education teacher and special education teacher will members of the IEP team for a particular child with a disability?

27. For a child whose primary disability is a speech impairment, may a public agency meet its responsibility under § 300.344(a)(3) to ensure that the IEP team includes "at least one special education teacher, or, if appropriate, at least one special education provider of the child" by including a speech-language pathologist on the IEP team?

28. Do public agencies and parents have the option of having any individual of their choice attend a child's IEP meeting as participants on their child's IEP team?

29. Can parents or public agencies bring their attorneys to IEP meetings, and, if so under what circumstances? Are attorney's fees available for parents' attorneys if the parents are prevailing parties in actions or proceedings brought under Part B?

30. Must related services personnel attend IEP meetings?

31. Must the public agency ensure that all services specified in a child's IEP are provided?

32. Is it permissible for an agency to have the IEP completed before the IEP meeting begins?

33. Must a public agency include transportation in a child's IEP as a related service?

34. Must a public agency provide related services that are required to assist a child with a disability to benefit from special education, whether or not those services are included in the list of related services in § 300.24?

35. Must the IEP specify the amount of services or may it simply list the services to be provided?

36. Under what circumstances is a public agency required to permit a child with a disability to use a school-purchased assistive technology device in the child's home or in another setting?

37. Can the IEP team also function as the group making the placement decision for a child with a disability?

38. If a child's IEP includes behavioral strategies to address a particular behavior, can a child ever be suspended for engaging in that behavior?

39. If a child's behavior in the regular classroom, even with appropriate interventions, would significantly impair the learning of others, can the group that makes the placement decision determine that placement in the regular classroom is inappropriate for that child?

40. May school personnel during a school year implement more than one short-term removal of a child with disabilities from his or her classroom or school for misconduct?

Authority: Part B of the Individuals with Disabilities Education Act (20 U.S.C. 1401, *et seq.*), unless otherwise noted.

Individualized Education Programs (IEPS) and Other Selected ImplementatioN Issues

Interpretation of IEP and Other selected Requirements under Part B of the Individuals with Disabilities Education Act (IDEA; Part B)

Introduction

The IEP requirements under Part B of the IDEA emphasize the importance of three core concepts: (1) the involvement and progress of each child with a disability in the general curriculum including addressing the unique needs that arise out of the child's disability; (2) the involvement of parents and students, together with regular and special education personnel, in making individual decisions to support each student's (child's) educational success, and (3) the preparation of students with disabilities for employment and other post-school activities.

The first three sections of this Appendix (I–III) provide guidance regarding the IEP requirements as they relate to the three core concepts described above. Section IV addresses other questions regarding the development and content of IEPs, including questions about the timelines and responsibility for developing and implementing IEPs, participation in IEP meetings, and IEP content. Section IV also addresses questions on other selected requirements under IDEA.

I. Involvement and Progress of Each Child With a Disability in the General Curriculum

In enacting the IDEA Amendments of 1997, the Congress found that research, demonstration, and practice over the past 20 years in special education and related disciplines have demonstrated that an effective educational system now and in the future must maintain high academic standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that students who are children with disabilities have maximum opportunities to achieve those standards and goals. [Section 651(a)(6)(A) of the Act.]

Accordingly, the evaluation and IEP provisions of Part B place great emphasis on the involvement and progress of children with disabilities in the general curriculum. (The term "general curriculum," as used in these regulations, including this Appendix, refers to the curriculum that is used with nondisabled children.)

While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services, provided to each child with a disability, they are driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aids and services.

In many cases, children with disabilities will need appropriate supports in order to successfully progress in the general curriculum, participate in State and district-wide assessment programs, achieve the measurable goals in their IEPs, and be educated together with their nondisabled peers. Accordingly, the Act requires the IEP team to determine, and the public agency to provide, the accommodations, modifications, supports, and supplementary aids and services, needed by each child with a disability to successfully be involved in and progress in the general curriculum achieve the goals of the IEP, and successfully demonstrate his or her competencies in State and district-wide assessments.

1. What are the major Part B IEP requirements that govern the involvement and progress of children with disabilities in the general curriculum?

Present Levels of Educational Performance

Section 300.347(a)(1) requires that the IEP for each child with a disability include "* * * a statement of the child's present levels of educational performance, including—(i) *how the child's disability affects the child's involvement and progress in the general curriculum;* or (ii) *for preschool children, as appropriate, how the child's disability affects the child's participation in appropriate activities* * * *" ("Appropriate activities" in this context refers to age-relevant developmental abilities or milestones that typically developing children of the same age would be performing or would have achieved.)

The IEP team's determination of how each child's disability affects the child's involvement and progress in the general curriculum is a primary consideration in the development of the child's IEP. In assessing children with disabilities, school districts may use a variety of assessment techniques to determine the extent to which these children can be involved and progress in the general curriculum, such as criterion-referenced tests, standard achievement tests, diagnostic tests, other tests, or any combination of the above.

The purpose of using these assessments is to determine the child's present levels of educational performance and areas of need arising from the child's disability so that approaches for ensuring the child's involvement and progress in the general curriculum and any needed adaptations or modifications to that curriculum can be identified.

Measurable Annual Goals, including Benchmarks or Short-term ojectives

Measurable annual goals, including benchmarks or short-term objectives, are critical to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team (1) can develop strategies that will be most effective in realizing those goals and (2) must develop either measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable parents, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the student's instructional needs.

The strong emphasis in Part B on linking the educational program of children with disabilities to the general curriculum is reflected in § 300.347(a)(2), which requires that the IEP include:

> a statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) *meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum;* and (ii) meeting each of the child's other educational needs that result from the child's disability.

As noted above, each annual goal must include either short-term objectives or benchmarks. The purpose of both is to enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP, to gauge, at intermediate times during the year, how well the child is progressing toward achievement of the annual goal. IEP teams may continue to develop short-term instructional objectives, that generally break the skills described in the annual goal down into discrete components. The revised statute and regulations also provide that, as an alternative, IEP teams may develop benchmarks, which can be thought of as describing the amount of progress the child is expected to make within specified segments of the year. Generally, benchmarks establish expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents of their child's progress toward achieving the annual goals. An IEP team may use either short term objectives or benchmarks or a combination of the two depending on the nature of the annual goals and the needs of the child.

Special Education and Related Services and Supplementary Aids and Services

The requirements regarding services provided to address a child's present levels of educational performance and to make progress toward the identified goals reinforce the emphasis on progress in the general curriculum, as well as maximizing the extent to which children with disabilities are educated with nondisabled children. Section 300.347(a)(3) requires that the IEP include:

> a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—(i) to advance appropriately toward attaining the annual goals; (ii) *to be involved and progress in the general curriculum* * * * and to participate in extracurricular and other nonacademic activities; and (iii) *to be educated and participate with other children with disabilities and nondisabled children in [extracurricular and other nonacademic activities]* * * * [Italics added.]

Extent to Which Child Will Participate With Nondisabled Children

Section 300.347(a)(4) requires that each child's IEP include "An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in [extracurricular and other nonacademic] activities * * *" This is consistent with the least restrictive environment (LRE) provisions at §§ 300.550–300.553, which include requirements that:

(1) each child with a disability be educated with nondisabled children to the maximum extent appropriate (§ 300.550(b)(1));

(2) each child with a disability be removed from the regular educational environment only when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (§ 300.550(b)(1)); and

(3) to the maximum extent appropriate to the child's needs, each child with a disability participates with nondisabled children in nonacademic and extracurricular services and activities (§ 300.553).

All services and educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success. Placing children with disabilities in this manner should enable each disabled child to meet high expectations in the future.

Although Part B requires that a child with a disability not be removed from the regular educational environment if the child's education can be achieved satisfactorily in regular classes with the use of supplementary aids and services, Part B's LRE principle is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully. Even though IDEA does not mandate regular class placement for every disabled student, IDEA presumes that the first placement option considered for each disabled student by the student's placement team, which must include the parent, is the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a disabled child can be placed outside of the regular educational environment, the full range of supplementary aids and services that if provided would facilitate the student's placement in the regular classroom setting must be considered. Following that consideration, if a determination is made that particular disabled student cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that student then could be placed in a setting other than the regular classroom. Later, if it becomes apparent that the child's IEP can be carried out in a less restrictive setting, with the provision of appropriate supplementary aids and services, if needed, Part B would require that the child's placement be changed from the more restrictive setting to a less restrictive setting. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as category of disability, significance of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. Rather, each student's IEP forms the basis for the placement decision.

Further, a student need not fail in the regular classroom before another placement can be considered. Conversely, IDEA does not require that a student demonstrate achievement of a specific performance level as a prerequisite for placement into a regular classroom.

Participation in State or District-Wide Assessments of Student Achievement

Consistent with § 300.138(a), which sets forth a presumption that children with disabilities will be included in general State and district-wide assessment programs, and provided with appropriate accommodations if necessary, § 300.347(a)(5) requires that the IEP for each student with a disability include: "(i) a statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and (ii) if the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment of student achievement), a statement of—(A) Why that assessment is not appropriate for the child; and (B) How the child will be assessed."

Regular Education Teacher Participation in the Development, Review, and Revision of IEPs

Very often, regular education teachers play a central role in the education of children with disabilities (H. Rep. No. 105–95, p. 103 (1997); S. Rep. No. 105–17, p. 23 (1997)) and have important expertise regarding the general curriculum and the general education environment. Further, with the emphasis on involvement and progress in the general curriculum added by the IDEA Amendments of 1997, regular education teachers have an increasingly critical role (together with special education and related services personnel) in implementing the program of FAPE for most children with disabilities, as described in their IEPs.

Accordingly, the IDEA Amendments of 1997 added a requirement that each child's IEP team must include at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment (see § 300.344(a)(2)). (See also §§ 300.346(d) on the role of a regular education teacher in the development, review and revision of IEPs.)

2. Must a child's IEP address his or her involvement in the general curriculum, regardless of the nature and severity of the child's disability and the setting in which the child is educated?

Yes. The IEP for each child with a disability (including children who are educated in separate classrooms or schools) must address how the child will be involved and progress in the general curriculum. However, the Part B regulations recognize that some children have other educational needs resulting from their disability that also must be met, even though those needs are not directly linked to participation in the general curriculum.

Accordingly, § 300.347(a)(1)(2) requires that each child's IEP include:

> A statement of measurable annual goals, including benchmarks or short-term objectives related to—(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and (ii) meeting each of the child's other educational needs that result from the child's disability. [Italics added.]

Thus, the IEP team for each child with a disability must make an individualized determination regarding (1) how the child will be involved and progress in the general curriculum and what needs that result from the child's disability must be met to facilitate that participation; (2) whether the child has any other educational needs resulting from his or her disability that also must be met; and (3) what special education and other services and supports must be described in the child's IEP to address both sets of needs (consistent with § 300.347(a)). For example, if the IEP team determines that in order for a child who is deaf to participate in the general curriculum he or she needs sign language and materials which reflect his or her language development, those needs (relating to the child's participation in the general curriculum) must be addressed in the child's IEP. In addition, if the team determines that the child also needs to expand his or her vocabulary in sign language that service must also be addressed in the applicable components of the child's IEP. The IEP team may also wish to consider whether there is a need for members of the child's family to receive training in sign language in order for the child to receive FAPE.

3. What must public agencies do to meet the requirements at §§ 300.344(a)(2) and 300.346(d) regarding the participation of a "regular education teacher" in the development, review, and revision of IEPs, for children aged 3 through 5 who are receiving preschool special education services?

If a public agency provides "regular education" preschool services to non-disabled children, then the requirements of §§ 300.344(a)(2) and 300.346(d) apply as they do in the case of older children with disabilities. If a public agency makes kindergarten available to nondisabled children, then a regular education kindergarten teacher could appropriately be the regular education teacher who would be a member of the IEP team, and, as appropriate, participate in IEP meetings, for a kindergarten-aged child who is, or may be, participating in the regular education environment.

If a public agency does not provide regular preschool education services to nondisabled children, the agency could designate an individual who, under State standards, is qualified to serve nondisabled children of the same age.

4. Must the measurable annual goals in a child's IEP address all areas of the general curriculum, or only those areas in which the child's involvement and progress are affected by the child's disability?

Section 300.347(a)(2) requires that each child's IEP include "A statement of measurable annual goals, including benchmarks or short-term objectives, related to—(i) *meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum* * * *; and (ii) meeting each of the child's other educational needs that result from the child's disability. . . ." (Italics added).

Thus, a public agency is not required to include in an IEP annual goals that relate to areas of the general curriculum in which the child's disability does not affect the child's ability to be involved in and progress in the general curriculum. If a child with a disability needs only modifications or accommodations in order to progress in an area of the general curriculum, the IEP does not need to include a goal for that area; however, the IEP would need to specify those modifications or accommodations.

Public agencies often require all children, including children with disabilities, to demonstrate mastery in a given area of the general curriculum before allowing them to progress to the next level or grade in that area. Thus, in order to ensure that each child with a disability can effectively demonstrate competencies in an applicable area of the general curriculum, it is important for the IEP team to consider the accommodations and modifications that the child needs to assist him or her in demonstrating progress in that area.

II. Involvement of Parents and Students

The Congressional Committee Reports on the IDEA Amendments of 1997 express the view that the Amendments provide an opportunity for strengthening the role of parents, and emphasize that one of the purposes of the Amendments is to expand opportunities for parents and key public agency staff (e.g., special education, related services, regular education, and early intervention service providers, and other personnel) to work in new partnerships at both the State and local levels (H. Rep. 105–95, p. 82 (1997); S. Rep. No. 105–17, p. 4 and 5 (1997)). Accordingly, the IDEA Amendments of 1997 require that parents have an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child (§ 300.501(a)(2)). Thus, parents must now be part of: (1) the group that determines what additional data are needed as part of an evaluation of their child (§ 300.533(a)(1)); (2) the team that determines their child's eligibility (§ 300.534(a)(1)); and (3) the group that makes decisions on the educational placement of their child (§ 300.501(c)).

In addition, the concerns of parents and the information that they provide regarding their children must be considered in developing and reviewing their children's IEPs (§§ 300.343(c)(iii) and 300.346(a)(1)(i) and (b)); and the requirements for keeping parents informed about the educational progress of their children, particularly as it relates to their progress in the general curriculum, have been strengthened (§ 300.347(a)(7)).

The IDEA Amendments of 1997 also contain provisions that greatly strengthen the involvement of students with disabilities in decisions regarding their own futures, to facilitate movement from school to post-school activities. For example, those amendments (1) retained, essentially verbatim, the "transition services" requirements from the IDEA Amendments of 1990 (which provide that a statement of needed transition services must be in the IEP of each student with a disability, beginning no later than age 16); and (2) significantly expanded those provisions by adding a new annual requirement for the IEP to include "transition planning" activities for students beginning at age 14. (See section IV of this appendix for a description of the transition services requirements and definition.)

With respect to student involvement in decisions regarding transition services, § 300.344(b) provides that (1) "the public agency shall invite a student with a disability of any age to attend his or her IEP meeting if a purpose of the meeting will be the consideration of—(i) The student's transition services needs under § 300.347(b)(1); or (ii) The needed transition services for the student under § 300.347(b)(2); or (iii) Both;" and (2) "If the student does not attend the IEP meeting, the public agency shall take other steps to ensure that the student's preferences and interests are considered." (§ 300.344(b)(2)).

The IDEA Amendments of 1997 also give States the authority to elect to transfer the rights accorded to parents under Part B to each student with a disability upon reaching the age of majority under State law (if the student has not been determined incompetent under State law) (§ 300.517). (Part B requires that if the rights transfer to the student, the public agency must provide any notice required under Part B to both the student and the parents.) If the State elects to provide for the transfer of rights from the parents to the student at the age of majority, the IEP must, beginning at least one year before a student reaches the age of majority under State law, include a statement that the student has been informed of any rights that will transfer to him or her upon reaching the age of majority. (§ 300.347(c)).

The IDEA Amendments of 1997 also permit, but do not require, States to establish a procedure for appointing the parent, or another appropriate individual if the parent is not available, to represent the educational interests of a student with a disability who has reached the age of majority under State law and has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to his or her educational program.

5. What is the role of the parents, including surrogate parents, in decisions regarding the educational program of their children?

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

As previously noted in the introduction to section II of this Appendix, Part B specifically provides that parents of children with disabilities—

- Have an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of their child, and the provision of FAPE to the child (including IEP meetings) (§§ 300.501(b), 300.344(a)(1), and 300.517;
- Be part of the groups that determine what additional data are needed as part of an evaluation of their child (§ 300.533(a)(1)), and determine their child's eligibility (§ 300.534(a)(1)) and educational placement (§ 300.501(c));
- Have their concerns and the information that they provide regarding their child considered in developing and reviewing their child's IEPs (§§ 300.343(c)(iii) and 300.346(a)(1)(i) and (b)); and
- Be regularly informed (by such means as periodic report cards), as specified in their child's IEP, at least as often as parents are informed of their nondisabled children's progress, of their child's progress toward the annual goals in the IEP and the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year (§ 300.347(a)(7)).

A surrogate parent is a person appointed to represent the interests of a child with a disability in the educational decision-making process when no parent (as defined at § 300.20) is known, the agency, after reasonable efforts, cannot locate the child's parents, or the child is a ward of the State under the laws of the State. A surrogate parent has all of the rights and responsibilities of a parent under Part B (§ 300.515.)

6. What are the Part B requirements regarding the participation of a student (child) with a disability in an IEP meeting?

If a purpose of an IEP meeting for a student with a disability will be the consideration of the student's transition services needs or needed transition services under § 300.347(b)(1) or (2), or both, the public agency must invite the student and, as part of the notification to the parents of the IEP meeting, inform the parents that the agency will invite the student to the IEP meeting.

If the student does not attend, the public agency must take other steps to ensure that the student's preferences and interests are considered. (See § 300.344(b)).

Section § 300.517 permits, but does not require, States to transfer procedural rights under Part B from the parents to students with disabilities who reach the age of majority under State law, if they have not been determined to be incompetent under State law. If those rights are to be transferred from the parents to the student, the public agency would be required to ensure that the student has the right to participate in IEP meetings set forth for parents in § 300.345. However, at the discretion of the student or the public agency, the parents also could attend IEP meetings as "* * * individuals who have knowledge or special expertise regarding the child * * *" (see § 300.344(a)(6)).

In other circumstances, a child with a disability may attend "if appropriate." (§ 300.344(a)(7)). Generally, a child with a disability should attend the IEP meeting if the parent decides that it is appropriate for the child to do so. If possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance would be (1) helpful in developing the IEP or (2) directly beneficial to the child or both. The agency should inform the parents before each IEP meeting—as part of notification under § 300.345(a)(1)—that they may invite their child to participate.

7. Must the public agency inform the parents of who will be at the IEP meeting?

Yes. In notifying parents about the meeting, the agency "must indicate the purpose, time, and location of the meeting, and *who will be in attendance*." (§ 300.345(b), italics added.) In addition, if a purpose of the IEP meeting will be the consideration of a student's transition services needs or needed transition services under § 300.347(b)(1) or (2) or both, the notice must also inform the parents that the agency is inviting the student, and identify any other agency that will be invited to send a representative.

The public agency also must inform the parents of the right of the parents and the agency to invite other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate to be members of the IEP team. (§ 300.345(b)(1)(ii).)

It also may be appropriate for the agency to ask the parents to inform the agency of any individuals the parents will be bringing to the meeting. Parents are encouraged to let the agency know whom they intend to bring. Such cooperation can facilitate arrangements for the meeting, and help ensure a productive, child-centered meeting.

8. Do parents have the right to a copy of their child's IEP?

Yes. Section 300.345(f) states that the public agency shall give the parent a copy of the IEP at no cost to the parent.

9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP?

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the (1) child's needs and appropriate goals; (2) extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs (§§ 300.343(c)(iii) and 300.346(a)(1) and (b)).

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority "vote." If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B.

10. Does Part B require that public agencies inform parents regarding the educational progress of their children with disabilities?

Yes. The Part B statute and regulations include a number of provisions to help ensure that parents are involved in decisions regarding, and are informed about, their child's educational progress, including the child's progress in the general curriculum. First, the parents will be informed regarding their child's present levels of educational performance through the development of the IEP. Section 300.347(a)(1) requires that each IEP include:

> * * * A statement of the child's present levels of educational performance, including—(i) how the child's disability affects the child's involvement and progress in the general curriculum; or (ii) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities * * *

Further, § 300.347(a)(7) sets forth new requirements for regularly informing parents about their child's educational progress, as regularly as parents of nondisabled children are informed of their child's progress. That section requires that the IEP include:

> A statement of—(i) How the child's progress toward the annual goals * * * will be measured; and (ii) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of—(A) their child's progress toward the annual goals; and (B) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

One method that public agencies could use in meeting this requirement would be to provide periodic report cards to the parents of students with disabilities that include both (1) the grading information provided for all children in the agency at the same intervals; and (2) the specific information required by § 300.347(a)(7)(ii)(A) and (B).

Finally, the parents, as part of the IEP team, will participate at least once every 12 months in a review of their child's educational progress. Section 300.343(c) requires that a public agency initiate and conduct a meeting, at which the IEP team:

> * * * (1) Reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and (2) revises the IEP as appropriate to address—(i) any lack of expected progress toward the annual goals * * * and in the general curriculum, if appropriate; (ii) The results of any reevaluation * * *; (iii) Information about the child provided to, or by, the parents * * *; (iv) The child's anticipated needs; or (v) Other matters.

III. Preparing Students With Disabilities for Employment and Other Post-School Experiences

One of the primary purposes of the IDEA is to "* * * ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living * * *" (§ 300.1(a)). Section 701 of the Rehabilitation Act of 1973 describes the philosophy of independent living as including a philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, in order to maximize the leadership, empowerment, independence, and productivity of individuals with disabilities, and the integration and full inclusion of individuals with disabilities into the mainstream of American society. Because many students receiving services under IDEA will also receive services under the Rehabilitation Act, it is important, in planning for their future, to consider the impact of both statutes.

Similarly, one of the key purposes of the IDEA Amendments of 1997 was to "promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment." (H. Rep. No. 105–95, p. 82 (1997); S. Rep. No. 105–17, p. 4 (1997)).

Thus, throughout their preschool, elementary, and secondary education, the IEPs for children with disabilities must, to the extent appropriate for each individual child, focus on providing instruction and experiences that enable the child to prepare himself or herself for later educational experiences and for post-school activities, including formal education, if appropriate, employment, and independent living. Many students with disabilities will obtain services through State vocational rehabilitation programs to ensure that their educational goals are effectively implemented in post-school activities. Services available through rehabilitation programs are consistent with the underlying purpose of IDEA.

Although preparation for adult life is a key component of FAPE throughout the educational experiences of students with disabilities, Part B sets forth specific requirements related to transition planning and transition services that must be implemented no later than ages 14 and 16, respectively, and which require an intensified focus on that preparation as these students begin and prepare to complete their secondary education.

11. What must the IEP team do to meet the requirements that the IEP include "a statement of * * * transition service needs" beginning at age 14 (§ 300.347(b)(1)(i))," and a statement of needed transition services" no later than age 16 (§ 300.347(b)(2)?

Section 300.347(b)(1) requires that, beginning no later than age 14, each student's IEP include specific transition-related content, and, beginning no later than age 16, a statement of needed transition services:

Beginning at age 14 and younger if appropriate, and updated annually, each student's IEP must include:

> "* * * a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program)" (§ 300.347(b)(1)(i)).

Beginning at age 16 (or younger, if determined appropriate by the IEP team), each student's IEP must include:

> "* * * a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages." (§ 300.347(b)(2)).

The Committee Reports on the IDEA Amendments of 1997 make clear that the requirement added to the statute in 1997 that beginning at age 14, and updated annually, the IEP include "a statement of the transition service needs" is "* * * designed to augment, and not replace," the separate, preexisting requirement that the IEP include, "* * * beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services * * *" (H. Rep. No. 105–95, p. 102 (1997); S. Rep. No. 105–17, p. 22 (1997)). As clarified by the Reports, "The purpose of [the requirement in § 300.347(b)(1)(i)] is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school." (H. Rep. No. 105–95, pp. 101–102 (1997); S. Rep. No. 105–17, p. 22 (1997)). The Reports further explain that "[F]or example, for a child whose transition goal is a job, a transition service could be teaching the child how to get to the job site on public transportation." (H. Rep. No. 105–95, p. 102 (1997); S. Rep. No. 105–17, p. 22 (1997)).

Thus, beginning at age 14, the IEP team, in determining appropriate measurable annual goals (including benchmarks or short-term objectives) and services for a student, must determine what instruction and educational experiences will assist the student to prepare for transition from secondary education to post-secondary life.

The statement of transition service needs should relate directly to the student's goals beyond secondary education, and show how planned studies are linked to these goals. For example, a student interested in exploring a career in computer science may have a statement of transition services needs connected to technology course work, while another student's statement of transition services needs could describe why public bus transportation training is important for future independence in the community.

Although the focus of the transition planning process may shift as the student approaches graduation, the IEP team must discuss specific areas beginning at least at the age of 14 years and review these areas annually. As noted in the Committee Reports, a disproportionate number of students with disabilities drop out of school before they complete their secondary education: "Too many students with disabilities are failing courses and dropping out of school. Almost twice as many students with disabilities drop out as compared to students without disabilities." (H. Rep. No. 105–95, p. 85 (1997), S. Rep. No. 105–17, p. 5 (1997).)

To help reduce the number of students with disabilities that drop out, it is important that the IEP team work with each student with a disability and the student's family to select courses of study that will be meaningful to the student's future and motivate the student to complete his or her education.

This requirement is distinct from the requirement, at § 300.347(b)(2), that the IEP include:

> * * * beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the child, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

The term "transition services" is defined at § 300.29 to mean:

> * * * a coordinated set of activities for a student with a disability that—(1) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (2) Is based on the individual student's needs, taking into account the student's preferences and interests; and (3) Includes—(i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

Thus, while § 300.347(b)(1) requires that the IEP team begin by age 14 to address the student's need for instruction that will assist the student to prepare for transition, the IEP must include by age 16 a statement of needed transition services under § 300.347(b)(2) that includes a "coordinated set of activities * * *, designed within an outcome-oriented process, that promotes movement from school to post-school activities * * *." (§ 300.29) Section 300.344(b)(3) further requires that, in implementing § 300.347(b)(1), public agencies (in addition to required participants for all IEP meetings), must also invite a representative of any other agency that is likely to be responsible for providing or paying for transition services. Thus, § 300.347(b)(2) requires a broader focus on coordination of services across, and linkages between, agencies beyond the SEA and LEA.

12. Must the IEP for each student with a disability, beginning no later than age 16, include all "needed transition services," as identified by the IEP team and consistent with the definition at § 300.29, even if an agency other than the public agency will provide those services? What is the public agency's responsibility if another agency fails to provide agreed-upon transition services?

Section 300.347(b)(2) requires that the IEP for each child with a disability, beginning no later than age 16, or younger if determined appropriate by the IEP team, include all "needed transition services," as identified by the IEP team and consistent with the definition at § 300.29, regardless of whether the public agency or some other agency will provide those services. Section 300.347(b)(2) specifically requires that the statement of needed transition services include, "* * * if appropriate, a statement of the interagency responsibilities or any needed linkages."

Further, the IDEA Amendments of 1997 also permit an LEA to use up to five percent of the Part B funds it receives in any fiscal year in combination with other amounts, which must include amounts other than education funds, to develop and implement a coordinated services system. These funds may be used for activities such as: (1) linking IEPs under Part B and Individualized Family Service Plans (IFSPs) under Part C, with Individualized Service Plans developed under multiple Federal and State programs, such as Title I of the Rehabilitation Act; and (2) developing and implementing interagency financing strategies for the provision of services, including transition services under Part B.

The need to include, as part of a student's IEP, transition services to be provided by agencies other than the public agency is contemplated by § 300.348(a), which specifies what the public agency must do if another agency participating in the development of the statement of needed transition services fails to provide a needed transition service that it had agreed to provide.

If an agreed-upon service by another agency is not provided, the public agency responsible for the student's education must implement alternative strategies to meet the student's needs. This requires that the public agency provide the services, or convene an IEP meeting as soon as possible to identify alternative strategies to meet the transition services objectives, and to revise the IEP accordingly.

Alternative strategies might include the identification of another funding source, referral to another agency, the public agency's identification of other district-wide or community resources that it can use to meet the student's identified needs appropriately, or a combination of these strategies. As emphasized by § 300.348(b), however:

> Nothing in [Part B] relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

However, the fact that an agency other than the public agency does not fulfill its responsibility does not relieve the public agency of its responsibility to ensure that FAPE is available to each student with a disability. (Section 300.142(b)(2) specifically requires that if an agency other than the LEA fails to provide or pay for a special education or related service (which could include a transition service), the LEA must, without delay, provide or pay for the service, and may then claim reimbursement from the agency that failed to provide or pay for the service.)

13. Under what circumstances must a public agency invite representatives from other agencies to an IEP meeting at which a child's need for transition services will be considered?

Section 300.344 requires that, "In implementing the requirements of [§ 300.347(b)(1)(ii) requiring a statement of needed transition services], the public agency shall also invite a representative of any other agency that is likely to be responsible for providing or paying for transition services." To meet this requirement, the public agency must identify all agencies that are "likely to be responsible for providing or paying for transition services" for each student addressed by § 300.347(b)(1), and must invite each of those agencies to the IEP meeting; and if an agency invited to send a representative to a meeting does not do so, the public agency must take other steps to obtain the participation of that agency in the planning of any transition services.

If, during the course of an IEP meeting, the team identifies additional agencies that are "likely to be responsible for providing or paying for transition services" for the student, the public agency must determine how it will meet the requirements of § 300.344.

IV. Other Questions Regarding the Development and Content of IEPS

14. For a child with a disability receiving special education for the first time, when must an IEP be developed—before or after the child begins to receive special education and related services?

Section 300.342(b)(1) requires that an IEP be "*in effect* before special education and related services are provided to an eligible child * * *" (Italics added.)

The appropriate placement for a particular child with a disability cannot be determined until after decisions have been made about the child's needs and the services that the public agency will provide to meet those needs. These decisions must be made at the IEP meeting, and it would not be permissible first to place the child and then develop the IEP. Therefore, the IEP must be developed before placement. (Further, the child's placement must be based, among other factors, on the child's IEP.)

This requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the evaluation process—before the IEP is finalized—to assist a public agency in determining the appropriate placement for the child. However, it is essential that the temporary placement not become the final placement before the IEP is finalized. In order to ensure that this does not happen, the State might consider requiring LEAs to take the following actions:

a. Develop an *interim* IEP for the child that sets out the specific conditions and timelines for the trial placement. (See paragraph c, following.)

b. Ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.

c. Set a specific timeline (e.g., 30 days) for completing the evaluation, finalizing the IEP, and determining the appropriate placement for the child.

d. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

15. Who is responsible for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA?

The answer as to which public agency has direct responsibility for ensuring the development of IEPs for children with disabilities served by a public agency other than an LEA will vary from State to State, depending upon State law, policy, or practice. The SEA is ultimately responsible for ensuring that all Part B requirements, including the IEP requirements, are met for eligible children within the State, including those children served by a public agency other than an LEA. Thus, the SEA must ensure that every eligible child with a disability in the State has FAPE available, regardless of which State or local agency is responsible for educating the child. (The only exception to this responsibility is that the SEA is not responsible for ensuring that FAPE is made available to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons, if the State has assigned that responsibility to a public agency other than the SEA. (See § 300.600(d)).

Although the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency agreements), the SEA must ensure that no eligible child with a disability is denied FAPE due to jurisdictional disputes among agencies.

When an LEA is responsible for the education of a child with a disability, the LEA remains responsible for developing the child's IEP, regardless of the public or private school setting into which it places the child.

16. For a child placed out of State by an educational or non-educational State or local agency, is the placing or receiving State responsible for the child's IEP?

Regardless of the reason for the placement, the "placing" State is responsible for ensuring that the child's IEP is developed and that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, the SEA in the placing State is ultimately responsible for ensuring that the child has FAPE available.

17. If a disabled child has been receiving special education from one public agency and transfers to another public agency in the same State, must the new public agency develop an IEP before the child can be placed in a special education program?

If a child with a disability moves from one public agency to another in the same State, the State and its public agencies have an ongoing responsibility to ensure that FAPE is made available to that child. This means that if a child moves to another public agency the new agency is responsible for ensuring that the child has available special education and related services in conformity with an IEP.

The new public agency must ensure that the child has an IEP in effect before the agency can provide special education and related services. The new public agency may meet this responsibility by either adopting the IEP the former public agency developed for the child or by developing a new IEP for the child. (The new public agency is strongly encouraged to continue implementing the IEP developed by the former public agency, if appropriate, especially if the parents believe their child was progressing appropriately under that IEP.)

Before the child's IEP is finalized, the new public agency may provide interim services agreed to by both the parents and the new public agency. If the parents and the new public agency are unable to agree on an interim IEP and placement, the new public agency must implement the old IEP to the extent possible until a new IEP is developed and implemented.

In general, while the new public agency must conduct an IEP meeting, it would not be necessary if: (1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new public agency determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the new public agency or the parent believes that it is not appropriate, the new public agency must develop a new IEP through appropriate procedures within a short time after the child enrolls in the new public agency (normally, within one week).

18. What timelines apply to the development and implementation of an initial IEP for a child with a disability?

Section 300.343(b) requires each public agency to ensure that within a reasonable period of time following the agency's receipt of parent consent to an initial evaluation of a child, the child is evaluated and, if determined eligible, special education and related services are made available to the child in accordance with an IEP. The section further requires the agency to conduct a meeting to develop an IEP for the child within 30 days of determining that the child needs special education and related services.

Section 300.342(b)(2) provides that an IEP must be implemented as soon as possible following the meeting in which the IEP is developed.

19. Must a public agency hold separate meetings to determine a child's eligibility for special education and related services, develop the child's IEP, and determine the child's placement, or may the agency meet all of these requirements in a single meeting?

A public agency may, after a child is determined by "a group of qualified professionals and the parent" (see § 300.534(a)(1)) to be a child with a disability, continue in the same meeting to develop an IEP for the child and then to determine the child's placement. However, the public agency must ensure that it meets: (1) the requirements of § 300.535 regarding eligibility decisions; (2) all of the Part B requirements regarding meetings to develop IEPs (including providing appropriate notification to the parents, consistent with the requirements of §§ 300.345, 300.503, and 300.504, and ensuring that all the required team members participate in the development of the IEP, consistent with the requirements of § 300.344;) and (3) ensuring that the placement is made by the required individuals, including the parent, as required by §§ 300.552 and 300.501(c).

20. How frequently must a public agency conduct meetings to review, and, if appropriate, revise the IEP for each child with a disability?

A public agency must initiate and conduct meetings periodically, but at least once every twelve months, to review each child's IEP, in order to determine whether the annual goals for the child are being achieved, and to revise the IEP, as appropriate, to address: (a) Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; (b) the results of any reevaluation; (c) information about the child provided to, or by, the parents; (d) the child's anticipated needs; or (e) other matters (§ 300.343(c)).

A public agency also must ensure that an IEP is in effect for each child at the beginning of each school year (§ 300.342(a)). It may conduct IEP meetings at any time during the year. However, if the agency conducts the IEP meeting prior to the beginning of the next school year, it must ensure that the IEP contains the necessary special education and related services and supplementary aids and services to ensure that the student's IEP can be appropriately implemented during the next school year. Otherwise, it would be necessary for the public agency to conduct another IEP meeting.

Although the public agency is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with a disability have the right to request an IEP meeting at any time. For example, if the parents believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting.

If a child's teacher feels that the child's IEP or placement is not appropriate for the child, the teacher should follow agency procedures with respect to: (1) calling or meeting with the parents or (2) requesting the agency to hold another IEP meeting to review the child's IEP.

The legislative history of Public Law 94-142 makes it clear that there should be as many meetings a year as any one child may need (121 Cong. Rec. S20428-29 (Nov. 19, 1975) (remarks of Senator Stafford)). Public agencies should grant any reasonable parent request for an IEP meeting. For example, if the parents question the adequacy of services that are provided while their child is suspended for short periods of time, it would be appropriate to convene an IEP meeting.

In general, if either a parent or a public agency believes that a required component of the student's IEP should be changed, the public agency must conduct an IEP meeting if it believes that a change in the IEP may be necessary to ensure the provision of FAPE.

If a parent requests an IEP meeting because the parent believes that a change is needed in the provision of FAPE to the child or the educational placement of the child, and the agency refuses to convene an IEP meeting to determine whether such a change is needed, the agency must provide written notice to the parents of the refusal, including an explanation of why the agency has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student.

Under § 300.507(a), the parents or agency may initiate a due process hearing at any time regarding any proposal or refusal regarding the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and the public agency must inform parents about the availability of mediation.

21. May IEP meetings be audio- or video-tape-recorded?

Part B does not address the use of audio or video recording devices at IEP meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.

If a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B. An SEA or school district that adopts a rule regulating the tape recording of IEP meetings also should ensure that it is uniformly applied.

Any recording of an IEP meeting that is maintained by the public agency is an "education record," within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR part 99) and part B (§§ 300.560–300.575).

Parents wishing to use audio or video recording devices at IEP meetings should consult State or local policies for further guidance.

22. Who can serve as the representative of the public agency at an IEP meeting?

The IEP team must include a representative of the public agency who: (a) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (b) is knowledgeable about the general curriculum; and (c) is knowledgeable about the availability of resources of the public agency (§ 300.344(a)(4)).

Each public agency may determine which specific staff member will serve as the agency representative in a particular IEP meeting, so long as the individual meets these requirements. It is important, however, that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided.

A public agency may designate another public agency member of the IEP team to also serve as the agency representative, so long as that individual meets the requirements of § 300.344(a)(4).

23. For a child with a disability being considered for initial provision of special education and related services, which teacher or teachers should attend the IEP meeting?

A child's IEP team must include at least one of the child's regular education teachers (if the child is, or may be participating in the regular education environment) and at least one of the child's special education teachers, or, if appropriate, at least one of the child's special education providers (§ 300.344(a)(2) and (3)).

Each IEP must include a statement of the present levels of educational performance, including a statement of how the child's disability affects the child's involvement and progress in the general curriculum (§ 300.347(a)(1)). At least one regular education teacher is a required member of the IEP team of a child who is, or may be, participating in the regular educational environment, regardless of the extent of that participation.

The requirements of § 300.344(a)(3) can be met by either: (1) a special education teacher of the child; or (2) another special education provider of the child, such as a speech pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction and is considered special education under applicable State standards.

Sometimes more than one meeting is necessary in order to finalize a child's IEP. In this process, if the special education teacher or special education provider who will be working with the child is identified, it would be useful to have that teacher or provider participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. If this is not possible, the public agency must ensure that the teacher or provider has access to the child's IEP as soon as possible after it is finalized and before beginning to work with the child.

Further, (consistent with § 300.342(b)), the public agency must ensure that each regular education teacher, special education teacher, related services provider and other service provider of an eligible child under this part (1) has access to the child's IEP, and (2) is informed of his or her specific responsibilities related to implementing the IEP, and of the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP. This requirement is crucial to ensuring that each child receives FAPE in accordance with his or her IEP, and that the IEP is appropriately and effectively implemented.

24. What is the role of a regular education teacher in the development, review and revision of the IEP for a child who is, or may be, participating in the regular education environment?

As required by § 300.344(a)(2), the IEP team for a child with a disability must include at least one regular education teacher of the child if the child is, or may be, participating in the regular education environment. Section 300.346(d) further specifies that the regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in—(1) the determination of appropriate positive behavioral interventions and strategies for the child; and (2) the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the child, consistent with 300.347(a)(3) (§ 300.344(d)).

Thus, while a regular education teacher must be a member of the IEP team if the child is, or may be, participating in the regular education environment, the teacher need not (depending upon the child's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made as part of the meeting or to be present throughout the entire meeting or attend every meeting. For example, the regular education teacher who is a member of the IEP team must participate in discussions and decisions about how to modify the general curriculum in the regular classroom to ensure the child's involvement and progress in the general curriculum and participation in the regular education environment.

Depending upon the specific circumstances, however, it may not be necessary for the regular education teacher to participate in discussions and decisions regarding, for example, the physical therapy needs of the child, if the teacher is not responsible for implementing that portion of the child's IEP.

In determining the extent of the regular education teacher's participation at IEP meetings, public agencies and parents should discuss and try to reach agreement on whether the child's regular education teacher that is a member of the IEP team should be present at a particular IEP meeting and, if so, for what period of time. The extent to which it would be appropriate for the regular education teacher member of the IEP team to participate in IEP meetings must be decided on a case-by-case basis.

25. If a child with a disability attends several regular classes, must all of the child's regular education teachers be members of the child's IEP team?

No. The IEP team need not include more than one regular education teacher of the child. If the participation of more than one regular education teacher would be beneficial to the child's success in school (e.g., in terms of enhancing the child's participation in the general curriculum), it would be appropriate for them to attend the meeting.

26. How should a public agency determine which regular education teacher and special education teacher will be members of the IEP team for a particular child with a disability?

The regular education teacher who serves as a member of a child's IEP team should be a teacher who is, or may be, responsible for implementing a portion of the IEP, so that the teacher can participate in discussions about how best to teach the child.

If the child has more than one regular education teacher responsible for carrying out a portion of the IEP, the LEA may designate which teacher or teachers will serve as IEP team member(s), taking into account the best interest of the child.

In a situation in which not all of the child's regular education teachers are members of the child's IEP team, the LEA is strongly encouraged to seek input from the teachers who will not be attending. In addition, consistent with § 300.342(b)), the LEA must ensure that each regular education teacher (as well as each special education teacher, related services provider, and other service provider) of an eligible child under this part (1) has access to the child's IEP, and (2) is informed of his or her specific responsibilities related to implementing the IEP, and of the specific accommodations, modifications and supports that must be provided to the child in accordance with the IEP.

In the case of a child whose behavior impedes the learning of the child or others, the LEA is encouraged to have a regular education teacher or other person knowledgeable about positive behavior strategies at the IEP meeting. This is especially important if the regular education teacher is expected to carry out portions of the IEP.

Similarly, the special education teacher or provider of the child who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP. If, for example, the child's disability is a speech impairment, the special education teacher on the IEP team could be the speech-language pathologist.

27. For a child whose primary disability is a speech impairment, may a public agency meet its responsibility under § 300.344(a)(3) to ensure that the IEP team includes "at least one special education teacher, or, if appropriate, at least one special education provider of the child" by including a speech-language pathologist on the IEP team?

Yes, if speech is considered special education under State standards. As with other children with disabilities, the IEP team must also include at least one of the child's *regular education* teachers if the child is, or may be, participating in the regular education environment.

28. Do parents and public agencies have the option of inviting any individual of their choice be participants on their child's IEP team?

The IEP team may, at the discretion of the parent or the agency, include "other individuals *who have knowledge or special expertise regarding the child* * * *" (§ 300.344(a)(6), italics added). Under § 300.344(a)(6), these individuals are members of the IEP team. This is a change from prior law, which provided, without qualification, that parents or agencies could have other individuals as members of the IEP team at the discretion of the parents or agency.

Under § 300.344(c), the determination as to whether an individual has knowledge or special expertise, within the meaning of § 300.344(a)(6), shall be made by the parent or public agency who has invited the individual to be a member of the IEP team.

Part B does not provide for including individuals such as representatives of teacher organizations as part of an IEP team, unless they are included because of knowledge or special expertise regarding the child. (Because a representative of a teacher organization would generally be concerned with the interests of the teacher rather than the interests of the child, and generally would not possess knowledge or expertise regarding the child, it generally would be inappropriate for such an official to be a member of the IEP team or to otherwise participate in an IEP meeting.)

29. Can parents or public agencies bring their attorneys to IEP meetings, and, if so under what circumstances? Are attorney's fees available for parents' attorneys if the parents are prevailing parties in actions or proceedings brought under Part B?

Section 300.344(a)(6) authorizes the addition to the IEP team of other individuals at the discretion of the parent or the public agency only if those other individuals have knowledge or special expertise regarding the child. The determination of whether an attorney possesses knowledge or special expertise regarding the child would have to be made on a case-by-case basis by the parent or public agency inviting the attorney to be a member of the team.

The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting. Even if the attorney possessed knowledge or special expertise regarding the child (§ 300.344(a)(6)), an attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child.

Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged. Further, as specified in Section 615(i)(3)(D)(ii) of the Act and § 300.513(c)(2)(ii), Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation conducted prior to the request for a due process hearing.

30. Must related services personnel attend IEP meetings?

Although Part B does not expressly require that the IEP team include related services personnel as part of the IEP team (§ 300.344(a)), it is appropriate for those persons to be included if a particular related service is to be discussed as part of the IEP meeting. Section 300.344(a)(6) provides that the IEP team also includes "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, *including related services personnel as appropriate.* * * *" (Italics added.)

Further, § 300.344(a)(3) requires that the IEP team for each child with a disability include "at least one special education teacher, or, if appropriate, at least one special education provider of the child * * *" This requirement can be met by the participation of either (1) a special education teacher of the child, or (2) another special education provider such as a speech-language pathologist, physical or occupational therapist, etc., if the related service consists of specially designed instruction and is considered special education under the applicable State standard.

If a child with a disability has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. As explained in the Committee Reports on the IDEA Amendments of 1997, "Related services personnel should be included on the team when a particular related service will be discussed at the request of the child's parents or the school." (H. Rep. No. 105–95, p. 103 (1997); S. Rep. No. 105–17, p. 23 (1997)). For example, if the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, special transportation services, school social work services, school health services, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child. This written recommendation could be a part of the evaluation report.

A public agency must ensure that all individuals who are necessary to develop an IEP that will meet the child's unique needs, and ensure the provision of FAPE to the child, participate in the child's IEP meeting.

31. Must the public agency ensure that all services specified in a child's IEP are provided?

Yes. The public agency must ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. The agency may provide each of those services directly, through its own staff resources; indirectly, by contracting with another public or private agency; or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see § 300.301(a)); but the services must be at no cost to the parents, and the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the student's needs as specified in the IEP. The SEA and responsible public agency may not allow the failure of another agency to provide service(s) described in the child's IEP to deny or delay the provision of FAPE to the child. (See § 300.142, Methods of ensuring services.)

32. Is it permissible for an agency to have the IEP completed before the IEP meeting begins?

No. Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content, but the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. Parents have the right to bring questions, concerns, and recommendations to an IEP meeting as part of a full discussion, of the child's needs and the services to be provided to meet those needs before the IEP is finalized.

Public agencies must ensure that, if agency personnel bring drafts of some or all of the IEP content to the IEP meeting, there is a full discussion with the child's parents, before the child's IEP is finalized, regarding drafted content and the child's needs and the services to be provided to meet those needs.

33. Must a public agency include transportation in a child's IEP as a related service?

As with other related services, a public agency must provide transportation as a related service if it is required to assist the disabled child to benefit from special education. (This includes transporting a preschool-aged child to the site at which the public agency provides special education and related services to the child, if that site is different from the site at which the child receives other preschool or day care services.)

In determining whether to include transportation in a child's IEP, and whether the child needs to receive transportation as a related service, it would be appropriate to have at the IEP meeting a person with expertise in that area. In making this determination, the IEP team must consider how the child's disability affects the child's need for transportation, including determining whether the child's disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children.

The public agency must ensure that any transportation service included in a child's IEP as a related service is provided at public expense and at no cost to the parents, and that the child's IEP describes the transportation arrangement.

Even if a child's IEP team determines that the child does not require transportation as a related service, Section 504 of the Rehabilitation Act of 1973, as amended, requires that the child receive the same transportation provided to nondisabled children. If a public agency transports nondisabled children, it must transport disabled children under the same terms and conditions. However, if a child's IEP team determines that the child does not need transportation as a related service, and the public agency transports only those children whose IEPs specify transportation as a related service, and does not transport nondisabled children, the public agency would not be required to provide transportation to a disabled child.

It should be assumed that most children with disabilities receive the same transportation services as nondisabled children. For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles.

34. Must a public agency provide related services that are required to assist a child with a disability to benefit from special education, whether or not those services are included in the list of related services in § 300.24?

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education. This could, depending upon the unique needs of a child, include such services as nutritional services or service coordination.

These determinations must be made on an individual basis by each child's IEP team.

35. Must the IEP specify the amount of services or may it simply list the services to be provided?

The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members (§ 300.347(a)(6)). The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

The amount of a special education or related service to be provided to a child may be stated in the IEP as a range (e.g., speech therapy to be provided three times per week for 30–45 minutes per session) only if the IEP team determines that stating the amount of services as a range is necessary to meet the unique needs of the child. For example, it would be appropriate for the IEP to specify, based upon the IEP team's determination of the student's unique needs, that particular services are needed only under specific circumstances, such as the occurrence of a seizure or of a particular behavior. A range may not be used because of personnel shortages or uncertainty regarding the availability of staff.

36. Under what circumstances is a public agency required to permit a child with a disability to use a school-purchased assistive technology device in the child's home or in another setting?

Each child's IEP team must consider the child's need for assistive technology (AT) in the development of the child's IEP (§ 300.346(a)(2)(v)); and the nature and extent of the AT devices and services to be provided to the child must be reflected in the child's IEP (§ 300.346(c)).

A public agency must permit a child to use school-purchased assistive technology devices at home or in other settings, if the IEP team determines that the child needs access to those devices in nonschool settings in order to receive FAPE (to complete homework, for example).

Any assistive technology devices that are necessary to ensure FAPE must be provided at no cost to the parents, and the parents cannot be charged for normal use, wear and tear. However, while ownership of the devices in these circumstances would remain with the public agency, State law, rather than Part B, generally would govern whether parents are liable for loss, theft, or damage due to negligence or misuse of publicly owned equipment used at home or in other settings in accordance with a child's IEP.

37. Can the IEP team also function as the group making the placement decision for a child with a disability?

Yes, a public agency may use the IEP team to make the placement decision for a child, so long as the group making the placement decision meets the requirements of §§ 300.552 and 300.501(c), which requires that the placement decision be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

38. If a child's IEP includes behavioral strategies to address a particular behavior, can a child ever be suspended for engaging in that behavior?

If a child's behavior impedes his or her learning or that of others, the IEP team, in developing the child's IEP, must consider, if appropriate, development of strategies, including positive behavioral interventions, strategies and supports to address that behavior, consistent with § 300.346(a)(2)(i). This means that in most cases in which a child's behavior that impedes his or her learning or that of others is, or can be readily anticipated to be, repetitive, proper development of the child's IEP will include the development of strategies, including positive behavioral interventions, strategies and supports to address that behavior. See § 300.346(c). This includes behavior that could violate a school code of conduct. A failure to, if appropriate, consider and address these behaviors in developing and implementing the child's IEP would constitute a denial of FAPE to the child. Of course, in appropriate circumstances, the IEP team, which includes the child's parents, might determine that the child's behavioral intervention plan includes specific regular or alternative disciplinary measures, such as denial of certain privileges or short suspensions, that would result from particular infractions of school rules, along with positive behavior intervention strategies and supports, as a part of a comprehensive plan to address the child's behavior. Of course, if short suspensions that are included in a child's IEP are being implemented in a manner that denies the child access to the ability to progress in the educational program, the child would be denied FAPE.

Whether other disciplinary measures, including suspension, are ever appropriate for behavior that is addressed in a child's IEP will have to be determined on a case by case basis in light of the particular circumstances of that incident. However, school personnel may not use their ability to suspend a child for 10 days or less at a time on multiple occasions in a school year as a means of avoiding appropriately considering and addressing the child's behavior as a part of providing FAPE to the child.

39. If a child's behavior in the regular classroom, even with appropriate interventions, would significantly impair the learning of others, can the group that makes the placement decision determine that placement in the regular classroom is inappropriate for that child?

The IEP team, in developing the IEP, is required to consider, when appropriate, strategies, including positive behavioral interventions, strategies and supports to address the behavior of a child with a disability whose behavior impedes his or her learning or that of others. If the IEP team determines that such supports, strategies or interventions are necessary to address the behavior of the child, those services must be included in the child's IEP. These provisions are designed to foster increased participation of children with disabilities in regular education environments or other less restrictive environments, not to serve as a basis for placing children with disabilities in more restrictive settings.

The determination of appropriate placement for a child whose behavior is interfering with the education of others requires careful consideration of whether the child can appropriately function in the regular classroom if provided appropriate behavioral supports, strategies and interventions. If the child can appropriately function in the regular classroom with appropriate behavioral supports, strategies or interventions, placement in a more restrictive environment would be inconsistent with the least restrictive environment provisions of the IDEA. If the child's behavior in the regular classroom, even with the provision of appropriate behavioral supports, strategies or interventions, would significantly impair the learning of others, that placement would not meet his or her needs and would not be appropriate for that child.

40. May school personnel during a school year implement more than one short-term removal of a child with disabilities from his or her classroom or school for misconduct?

Yes. Under § 300.520(a)(1), school personnel may order removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules, and additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, as long as these removals do not constitute a change of placement under § 300.519(b). However, these removals are permitted only to the extent they are consistent with discipline that is applied to children without disabilities. Also, school personnel should be aware of constitutional due process protections that apply to suspensions of all children. *Goss* v. *Lopez*, 419 U.S. 565 (1975). Section 300.121(d) addresses the extent of the obligation to provide services after a child with a disability has been removed from his or her current placement for more than 10 school days in the same school year.

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APPENDIX B to Part 300

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X-Y-Z.

BILLING CODE 4000-01-C

PART 303—EARLY INTERVENTION PROGRAM FOR INFANTS AND TODDLERS WITH DISABILITIES

2. The authority citation for part 303 continues to read as follows:

Authority: 20 U.S.C. 1431–1445, unless otherwise noted.

§ 303.1 [Amended]

3. Section 303.1 is amended by removing the word "program" in paragraph (a), and adding, in its place, "system."

§ 303.4 [Amended]

4. Section 303.4 is amended by revising the authority citation to read as follows:

(Authority: 20 U.S.C. 1419(h))

5. Section 303.5 is amended by adding ", and" at the end of paragraph (a)(1)(vi), by revising paragraph (a)(3), and by revising the authority citation to read as follows:

§ 303.5 Applicable regulations.

* * * * *

(a) * * *

(3) The following regulations in 34 CFR part 300 (Assistance to States for the Education of Children with Disabilities Program): §§ 300.560–300.577, and §§ 300.580–300.585.

* * * * *

(Authority: 20 U.S.C. 1401, 1416, 1417)

§§ 303.6, 303.12, and 303.18 [Amended]

6. The note preceding § 303.6 and following the heading "Definitions" is amended by removing the phrase "'natural environments" in § 303.12(b)(2)" and adding, in its place, "'natural environments' in § 303.18".

7. Section 303.10 is revised to read as follows:

§ 303.10 Developmental delay.

As used in this part, "developmental delay," when used with respect to an individual residing in a State, has the meaning given to that term under § 303.300.

(Authority: 20 U.S.C. 1432(3))

§ 303.12 [Amended]

8. Section 303.12(d)(11) is amended by removing the reference to "§ 303.22" and by adding in its place "§ 303.23".

9. Section 303.19 is revised to read as follows:

§ 303.19 Parent.

(a) *General.* As used in this part, "parent" means—

(1) A natural or adoptive parent of a child;

(2) A guardian;

(3) A person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or

(4) A surrogate parent who has been assigned in accordance with § 303.406.

(b) *Foster parent.* Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent under Part C of the Act if—

(1) The natural parents' authority to make the decisions required of parents under the Act has been extinguished under State law; and

(2) The foster parent—

(i) Has an ongoing, long-term parental relationship with the child;

(ii) Is willing to make the decisions required of parents under the Act; and

(iii) Has no interest that would conflict with the interests of the child.

(Authority: 20 U.S.C. 1401(19), 1431–1445)

10. Section 303.100 is amended by revising paragraph (d)(2) to read as follows:

§ 303.100 Conditions of assistance.

* * * * *

(d) * * *

(2) A new interpretation is made of the Act by a Federal court or the State's highest court; or

* * * * *

§ 303.140 [Amended]

11. In § 303.140 paragraph (b) is amended by adding the words, "in the State" after "services are available to all infants and toddlers with disabilities".

§ 303.145 [Amended]

12. Section 303.145 is amended by revising the heading for paragraph (c) to

read "Maintenance and implementation activities"; and by removing the words "planning, developing" in paragraph (c)(1), and adding, in their place, "maintaining". 3. Section 303.344 is amended by adding "and" after "§ 303.12(b)" in paragraph (d)(1)(ii), and by revising paragraph (h)(1) to read as follows:

§ 303.344 Content of an IFSP.

* * * * *

(h) *Transition from Part C services.* (1) The IFSP must include the steps to be taken to support the transition of the child, in accordance with § 303.148, to—

(i) Preschool services under Part B of the Act, to the extent that those services are appropriate; or

(ii) Other services that may be available, if appropriate.

* * * * *

14. Section 303.403 is amended by removing the word "and" at the end of paragraph (b)(2); by revising paragraph (b)(3); by adding a new paragraph (b)(4); and by revising the authority citation to read as follows:

§ 303.403 Prior notice; native language.

* * * * *

(b) * * *

(3) All procedural safeguards that are available under §§ 303.401–303.460 of this part; and

(4) The State complaint procedures under §§ 303.510–303.512, including a description of how to file a complaint and the timelines under those procedures.

* * * * *

(Authority: 20 U.S.C. 1439(a)(6) and (7))

15. Section 303.510 is revised to read as follows:

§ 303.510 Adopting complaint procedures.

(a) *General.* Each lead agency shall adopt written procedures for—

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that any public agency or private service provider is violating a requirement of Part C of the Act or this Part by—

(i) Providing for the filing of a complaint with the lead agency; and

(ii) At the lead agency's discretion, providing for the filing of a complaint with a public agency and the right to have the lead agency review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's procedures under §§ 303.510–303.512.

(b) *Remedies for denial of appropriate services.* In resolving a complaint in which it finds a failure to provide appropriate services, a lead agency, pursuant to its general supervisory authority under Part C of the Act, must address:

(1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and

(2) Appropriate future provision of services for all infants and toddlers with disabilities and their families.

(Authority: 20 U.S.C. 1435(a)(10))

16. Section 303.511 is revised to read as follows:

§ 303.511 An organization or individual may file a complaint.

(a) *General.* An individual or organization may file a written signed complaint under § 303.510. The complaint must include—

(1) A statement that the State has violated a requirement of part C of the Act or the regulations in this part; and

(2) The facts on which the complaint is based.

(b) *Limitations.* The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because—

(1) The alleged violation continues for that child or other children; or

(2) The complainant is requesting reimbursement or corrective action for a violation that occurred not more than three years before the date on which the complaint is received by the public agency.

(Authority: 20 U.S.C. 1435(a)(10))

17. Section 303.512 is revised to read as follows:

§ 303.512 Minimum State complaint procedures.

(a) *Time limit, minimum procedures.* Each lead agency shall include in its complaint procedures a time limit of 60 calendar days after a complaint is filed under § 303.510(a) to—

(1) Carry out an independent on-site investigation, if the lead agency determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part C of the Act or of this Part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—

(i) Findings of fact and conclusions; and

(ii) The reasons for the lead agency's final decision.

(b) *Time extension; final decisions; implementation.* The lead agency's procedures described in paragraph (a) of this section also must—

(1) Permit an extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(2) Include procedures for effective implementation of the lead agency's final decision, if needed, including—

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) *Complaints filed under this section, and due process hearings under § 303.420.* (1) If a written complaint is received that is also the subject of a due process hearing under § 303.420, or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60-calendar-day timeline using the complaint procedures described in paragraphs (a) and (b) of this section.

(2) If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties—

(i) The hearing decision is binding; and

(ii) The lead agency must inform the complainant to that effect.

(3) A complaint alleging a public agency's or private service provider's failure to implement a due process decision must be resolved by the lead agency.

(Authority: 20 U.S.C. 1435(a)(10))

18. Section 303.520 is amended by adding a new paragraph (d); and revising the authority citation to read as follows:

§ 303.520 Policies related to payment for services.

* * * * *

(d) *Proceeds from public or private insurance.* (1) Proceeds from public or private insurance are not treated as program income for purposes of 34 CFR 80.25.

(2) If a public agency spends reimbursements from Federal funds (*e.g.*, Medicaid) for services under this part, those funds are not considered State or local funds for purposes of the provisions contained in § 303.124.

(Authority: 20 U.S.C. 1432(4)(B), 1435(a)(10))

(Note: This attachment will not be codified in the Code of Federal Regulations.)

Attachment 1—Analysis of Comments and Changes

The following is an analysis of the significant issues raised by the public comments received on the NPRM published on October 22, 1997 (62 FR 55026), and a description of the changes made in the proposed regulations since publication of the NPRM.

Except for relevant general comments relating to the overall NPRM, which are discussed at the beginning of this analysis, specific substantive issues are discussed under the subpart and section of the regulations to which they pertain. References to subparts and section numbers in this attachment are to those contained in the final regulations.

This analysis generally does not address—

(a) Minor changes, including technical changes, made to the language published in the NPRM;

(b) Suggested changes the Secretary is not legally authorized to make under applicable statutory authority;

(c) The organizational structure of these regulations and the extent to which statutory language is used; and

(d) Comments that express concerns of a general nature about the Department or other matters that are not directly relevant to these regulations, such as requests for information about innovative instructional methods or matters that lie within the purview of State and local decision-makers.

General Comments

Comment: Some commenters stated that the notes in the regulations are extremely important because they provide additional information and clarification. Other commenters expressed concerns about the extensive use of notes throughout the NPRM and raised questions about their legal status. Several of the commenters stated that the number of notes should be dramatically reduced because they go well beyond clarification, creating a new interpretation that differs from the statutory language.

Many of the commenters stated that any note that is intended to be a requirement should be incorporated into the text of the regulations. Some of the commenters felt that all other notes that are not requirements should be deleted or otherwise moved to a nonregulatory format, such as a technical assistance document. Other commenters indicated that notes should be used only for guidance and examples, or clarifying information, including appropriate references to recent legislative history.

Discussion: In light of the comments received, certain changes with respect to notes in these final regulations are appropriate and should be made. The Department does not regulate by notes. Therefore, the substance of any note that should be a requirement should be incorporated into the text of the regulations. Information that was contained in a note that provides meaningful guidance is reflected in the discussion of the relevant section of these regulations in this Attachment so that the public will have access to the information. Information in any note that is not considered to be useful should simply be removed.

Changes: Consistent with the above discussion, all notes have been removed as notes from these final regulations. The substance of any note considered to be a requirement has been added to the text of the regulations. Information in any note considered to provide clarifying information or useful guidance has been incorporated into the discussion of the applicable comments in this Attachment or, as appropriate, in Appendix A (Notice of Interpretation on IEPs). Notes that are no longer relevant have simply been deleted. A table is included in attachment 3 that describes the disposition of all notes in the NPRM.

Comment: A few commenters stated that the NPRM should have focused only on implementing the IDEA Amendments of 1997, and expressed concern that it was used to regulate on subjects addressed in previous policy letters that should be published separately for public comment. These commenters stated that the attempt to bring forward in the NPRM policy letters that interpret prior law is inappropriate because the new law has a goal of including children with disabilities in the general curriculum and improving results for these children, in contrast to the focus in prior law of simply providing disabled children access to public schools.

Discussion: Publishing a separate NPRM on longstanding policy letters is not in the best interests of the general public because it would impose an added burden on the reviewers and would be inefficient, ineffective, and very costly. In fact, by incorporating the positions taken in these policy letters into the NPRM, they already have been subjected to the public comment process. It also would be confusing both to parents and public agencies if the longstanding policy interpretations were not included in these final regulations, because it would imply that the provisions were no longer in effect. Moreover, it is important for parents, public agency staff, and others to be able to review all proposed changes to the regulations at one time and in a single context.

Although the new amendments place greater emphasis on the participation of disabled children in the general curriculum and on ensuring better results for these children, the essential rights and protections in prior law, including the concept of the least restrictive environment have been retained under the IDEA Amendments of 1997, and, in many respects, have been strengthened. Many of the interpretations of prior law—including those relating to the rights and protections afforded under the law—continue to be relevant to implementing Part B. Therefore, it would be inappropriate to exclude them from the final regulations.

Changes: None.

Comment: Some commenters stated that, in the preamble to the NPRM, the characterization of prior law as focusing simply on ensuring access to education is a misstatement and should be deleted. The commenters indicated that the courts have traditionally acknowledged that disabled children were entitled to participate fully in all educational programs and services available to all other students, and added that a correct interpretation of prior law is necessary because of pending and new court cases.

Discussion: The broader interpretation of prior law raised by commenters is the correct one. That characterization is reflected in the definition of FAPE (that, among other things, FAPE includes preschool, elementary, or secondary school education in the State), and in the provisions under §§ 300.304 (Full educational opportunity goal) and 300.305 (Program options). The statement in the preamble, however, was reflective of the status of the education of disabled children prior to 1975—in which approximately one million of those children were excluded from public education, and of the evolution of the program over a 22-year period.

Experience and research over that period have demonstrated that, as reflected in the statutory findings, the education of disabled children can be more effective by having higher expectations for those children, and ensuring their access to the general curriculum, as well as other findings (see section 601(c)(5) of the Act). Therefore, it is correct to state that the 1997 amendments place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law.

Changes: None.

Comment: Commenters requested clarification relating to the "reserved" sections in the regulations, and indicated that if regulatory language is inserted into those reserved sections, the inserted language should be subjected to the same field input process that was used for the rest of the regulations.

Discussion: The reserved sections are simply placeholders for future regulations, if further regulations become necessary. Any regulations that would be added to those reserved sections in the future would be subject to notice and comment in accordance with the Department's rulemaking procedures. These procedures include a 90-day public comment period as required by section 607(a) of the Act.

Changes: None.

Subpart A

Purposes (§ 300.1)

Comment: Some commenters requested that § 300.1 be amended to include the new purposes under sections 601(d)(2) of the Act (relating to the early intervention program for infants and toddlers with disabilities under Part C of the Act), and 601(d)(3) (relating to ensuring that educators and parents have the tools necessary to improve educational results for children with disabilities).

Some commenters expressed their support of the emphasis on independent living and preparation for employment in the Act and regulations. A few commenters stated that the note following § 300.1 (that includes the definition of "independent living" from the Rehabilitation Act of 1973), sets forth the spirit of these regulations. Other commenters requested that the note be revised to clarify that the purpose of the note is not to disturb the longstanding understanding of FAPE for children with disabilities, and that maximization of educational services is not required under Part B.

Several commenters recommended that the note be deleted. Some of these commenters stated that it is misleading and confusing to include the purposes of other statutes in these regulations, that it implies that school districts are responsible for some rehabilitation services, and that "independent living" is a term of art, and not just an educational enterprise.

Discussion: Section 300.1 includes the statutory purposes that are specifically related to the Assistance for Education of All Children with Disabilities Program under Part B of the Act and to these regulations, which are codified at 34 CFR Part 300. Therefore, the list of statutory purposes contained in § 300.1 should be retained.

Although statutory purposes relating to Part C have not been included in these regulations, these purposes were included as part of the regulations in 34 CFR Part 303 implementing Part C published in the **Federal Register** on April 14, 1998 (63 FR 18289). In addition, although the second purpose in section 601(d)(3) of the Act is relevant to the successful implementation of these regulations, (i.e., ensuring that educators and parents have the tools necessary to improve educational results for children with disabilities) this statutory purpose is directed at the discretionary programs under Part D of the Act, and not to the requirements under Part B.

Independent living is an important concept in the education of children with disabilities, as set forth in § 300.1(a). However, because the note goes beyond the stated purposes of these regulations and focuses on a provision from another law, it is confusing, and the note should be deleted.

Changes: The note following § 300.1 has been deleted. A discussion of independent living has been incorporated into Appendix A with respect to transition services.

Applicability to State, Local, and Private Agencies (§ 300.2)

Comment: A few commenters recommended that charter schools be included in the list of public agencies to which these regulations apply, because these schools are sometimes treated by State law as political subdivisions, and, thus, would be subject to the requirements of these regulations. Other commenters emphasized the importance of clarifying the formal obligations of agencies other than educational agencies, particularly with respect to mental health services.

Discussion: Because of the increasing attention that charter schools are receiving, it is appropriate to specifically clarify that under the statute public charter schools that are not otherwise already included as LEAs or ESAs and are not a school of an LEA or ESA in the list of political subdivisions that are subject to the requirements of these regulations. Charter schools are also addressed in other sections of these regulations (see analysis of comments under §§ 300.18, 300.22, 300.241, and 300.312).

A change is not necessary to address responsibility of an agency other than an educational agency for services necessary for ensuring a free appropriate public education including mental health services. Section 300.142 addresses interagency agreements and the requirements of section 612(a)(12) of the Act regarding methods of ensuring services. See discussion of § 300.142 in this Analysis.

In light of the general decision to remove all notes from these final regulations, the note following this section of the NPRM should be deleted. The substance of this note, regarding the applicability of these regulations to each public agency that has direct or delegated authority to provide special education and related services in a State receiving Part B funds, regardless of that agency's receipt of Part B funds, should be incorporated into the text of this regulation.

Changes: Section 300.2 has been amended by redesignating the existing paragraph (b) as paragraph (b)(1), by adding public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA to the list of entities to which these regulations apply, and by removing the note to this section of the NPRM and adding the substance of that note as paragraph (b)(2) of this section.

Definitions—General Comments

Comment: Commenters recommended that the final regulations should (1) include a master list of all terms used in these regulations and the specific section in which each term is defined; (2) add other relevant statutory terms in the IDEA that were omitted from the NPRM (e.g., institution of higher education, nonprofit, parent organization, parent training and information center, and SEA etc.); (3) update § 300.28 to add "elementary school," "nonprofit," and "SEA" to the list of relevant terms defined in the Education Department General Administrative Regulations (EDGAR); (4) define terms used in two or more subparts of these regulations, such as consent, direct services, evaluation, personally identifiable, private school children with disabilities, and public expense; and (5) that the master list of definitions in note 1 to this section of the NPRM was not complete because it omitted the definitions of the thirteen terms defined within the definition of "child with a disability," the fifteen terms defined within the definition of "related services," and the four terms defined within the definition of "special education."

Some commenters requested that the following definitions be deleted: "comparable services" (§ 300.455); "extended school year" (§ 300.309); "meetings" (§ 300.501); and "financial costs" (§ 300.142(e)), because none of the terms is defined in the statute, and the regulations should not exceed the statute. Other commenters recommended adding definitions of "change of placement;" "competent eighteen year old;" "developmental delay;" "school day;" "extra curricular activities;" "functional behavioral assessment;" "impeding behavior;" "other agency personnel;" "paraprofessional;" "positive behavior support or intervention plan;" and "positive behavioral intervention strategies."

A few commenters expressed concern with the use of "adversely affects educational performance" throughout § 300.7(b) as potentially limiting the services that are provided to disabled children, especially those children who are academically gifted but who still need transition services to postsecondary education, and recommended that a definition of this term be added to the regulations.

Discussion: It would make the regulations more useful to parents and others by: (1) Adding to Subpart A the definitions of terms of general applicability (e.g., consent, evaluation, and personally identifiable) that are used in two or more subparts of these final regulations, and (2) adding to § 300.30, previously § 300.28 of the NPRM, relevant terms used in these regulations that are defined in EDGAR (e.g., elementary school, secondary school, nonprofit, and State educational agency).

It also would make the regulations more useful to include an alphabetical master list of the definitions of terms used in this part, and the specific section in which each term is defined, including terms of general applicability (e.g., FAPE and IEP), terms used in a single section or subpart (e.g., "illegal drug" and "weapon"), and individual terms used in the definitions of "child with a disability," "related services," and "special education." These regulations should include an index that identifies the key terms used in the regulations and lists the specific section in which each term is used; and the master list of definitions of the terms should be included in the index.

A definition of the term "parent training and information center" should not be added, but the statutory definition of that term in section 602(21) of the Act is referenced in the sections of these regulations that use the term (§ 300.506(d)(1)(i) (relating to mediation) and § 300.589(c)(4) (relating to waiver of the nonsupplanting requirement)), and the term "parent training centers", which has been dropped from § 300.660(b), would be replaced by a reference to the statutory term.

The disposition of the terms defined in §§ 300.142(e), 300.309, 300.455, and 300.501 of the NPRM is addressed in each of the pertinent sections of this attachment.

With respect to the term "adversely affects educational performance," in order for a child to be eligible for services under Part B, the child must meet the two-pronged test established under § 300.7(a), which reflects the statutory definition in section 602(3) of the Act. This means that the child has one of the listed conditions that adversely affects educational performance, and who, because of that condition, needs special education and related services. Revising this language in the manner suggested by commenters could result in an unwarranted expansion of eligibility under Part B. It should be pointed out that a child who is academically gifted but who may not be progressing at the rate desired is not automatically eligible under Part B. Neither is the child automatically ineligible. Rather, determinations as to a child's eligibility for services under Part B must be made on a case-by-case basis in accordance with applicable evaluation procedures.

In light of the general decision to remove all notes from these final regulations, Notes 1 and 2 following the subheading "Definitions" and immediately preceding § 300.5 in the NPRM should be deleted. Note 1 listed the terms defined in specific sections of the NPRM. As stated earlier in this discussion, those terms should be included in a master list of definitions in a newly-created index to these final regulations. Note 2 contained abbreviations of common terms used in these regulations (e.g. the use of "FAPE" for "free appropriate public education"). In lieu of listing those abbreviations in a note, each term should be included parenthetically in the text of the regulations as that term appears; and, thereafter, either the abbreviation or the full term may be used interchangeably, depending on the context in which it is used.

Changes: References to the terms defined in § 300.500—"consent," "evaluation," and "personally identifiable"—have been added as §§ 300.8, 300.12, and 300.21 of these final regulations. Relevant terms from EDGAR referenced throughout these regulations have been added to § 300.30. Notes 1 and 2 immediately preceding § 300.5 have been removed. An index to these regulations have been added as a new Appendix B, and a master list of the definitions of all terms used in this part has been included in the index under the heading "Definitions of terms used under this part." The abbreviations listed in Note 2 have been included in the text of the regulations, as described in the above discussion.

Assistive Technology Devices and Services (§§ 300.5 and 300.6)

Comment: Some commenters recommended that assistive technology devices and services be listed as a related service under § 300.22, as well as defined separately under §§ 300.5 and 300.6. Some commenters also recommended changes that would alter the statutory definitions of these terms. A few commenters requested that §§ 300.5 and 300.6 be amended to add language clarifying that assistive technology devices and services are only required for a disabled child if necessary for the child to benefit from special education. A few commenters stated that the regulations should clarify public agency responsibility for providing personal devices, such as eyeglasses, hearing aids, braces and medication, while other commenters recommended that the regulations make explicit that public agencies are not responsible for providing personally-prescribed devices under these regulations. Commenters also requested that the regulations include examples of assistive technology devices for children, including a range of high to low technology devices, such as postural supports, mobility aids, and positioning equipment. Commenters also requested clarification on how school districts draw distinctions between a child's need for an assistive technology device and a parent's desire for the child to have the newest and best device on the market.

Discussion: As stated in the note following § 300.6 of the NPRM, the definitions of "Assistive technology device" and "Assistive technology service" in sections 602(1) and 602(2) of the Act are substantially identical to the definitions of those terms used in the Technology-Related Assistance for Individuals with Disabilities Act of 1988, as amended (Tech Act). Since

§§ 300.5–300.6 essentially adopt the statutory definitions of these terms, no changes to these statutory definitions should be made in these final regulations. However, consistent with Part B, the words "child with a disability" were substituted for the statutory reference to individual with a disability found in the definitions contained in the Tech Act. In addition, in light of the general decision not to use notes in these final regulations, the note to § 300.6 of the NPRM should be removed.

Section 300.308 of these regulations specifies that an assistive technology device or service is only required if it is determined, through the IEP process, to be (1) special education, as defined in § 300.26, (2) related services, as defined in § 300.24, or (3) supplementary aids and services, as defined in § 300.28. No further clarification should be provided, and references to § 300.308 should not be included in the definitions of "related services" under § 300.24 or "special education" under § 300.26. Section 300.308 is sufficient to explain how a determination about a child's need for an assistive technology device or service is made.

As a general matter, public agencies are not responsible for providing personal devices, such as eyeglasses or hearing aids or braces, that a disabled child requires regardless of whether he or she is attending school. However, if a child's IEP team specifies that a child requires a personal device in order to receive FAPE, the public agency must provide the device at no cost to the child's parents. Consistent with section 612(a)(12) of the Act, public agencies that are otherwise obligated under Federal or State law or assigned responsibility under State policy or interagency agreement or other mechanisms to provide or pay for any services that are also considered special education or related services, including devices that are necessary for ensuring FAPE, must fulfill that obligation or responsibility, either directly or through contract or other arrangement.

Regarding responsibilities relative to medication under § 300.5, medication is an excluded "medical service," and is not the responsibility of a public agency under these regulations; therefore, the change suggested by commenters is not warranted.

Further examples of assistive technology are not necessary within these regulations. Because the definitions of assistive technology devices and services have been included in these regulations for over five years and have been included in the Tech Act since 1988, most public agencies should be informed about those devices and services for purposes of implementing these regulations. Examples of assistive technology devices and services and other relevant information may be available through one of the technical assistance providers funded by the National Institute on Disability and Rehabilitation Research in the Office of Special Education and Rehabilitative Services (OSERS) or other technical assistance providers funded by OSERS.

Changes: The note following § 300.6 has been removed.

Comment: Some commenters asked for clarification that (1) the statutory provision encompasses both a child's own assistive technology needs (e.g., electronic note takers, cassette recorders, and speech synthesizers), as well as access to general technology used by all students, (2) a child with a disability may take assistive technology devices home for use on homework and other assignments, as well as for use in the community, and (3) school districts have continuing responsibility for installation, repair, and maintenance of devices. These commenters added that in order to fully benefit from assistive technology, children with disabilities must be able to use it on all school-work assignments, whether done in the classroom or at home or in the community; and LEAs must ensure that children, their teachers, and other personnel receive the necessary in-service instruction on the operation and maintenance of technology. Other commenters requested that the final regulations specify in the text of the regulations or in a note (1) the right of children with disabilities to take devices home or to other settings, as needed, and (2) the issue of ownership and responsibility.

Discussion: The provision of assistive technology devices and services is limited to those situations in which they are required in order for a disabled child to receive FAPE. However, subject to this limitation, commenters are correct that (1) "assistive technology" encompasses both a disabled child's own personal needs for assistive technology devices (e.g., electronic note-takers, cassette recorders, etc), as well as access to general technology devices used by all students, and (2) if an eligible child is unable, without a specific accommodation, to use a technology device used by all students, the agency must ensure that the necessary accommodation is provided. Further, commenters are correct that LEAs must ensure that students, their teachers, and other personnel receive the necessary in-service instruction on the operation and maintenance of technology.

Finally, § 300.308 of these final regulations should be amended to clarify that, on a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs to have access to those devices in order to receive FAPE. The assistive technology devices that are necessary to ensure FAPE must be provided at no cost to the parents, and the parents cannot be charged for normal use, and wear and tear. However, while ownership of the device in these circumstances would remain with the public agency, State law, rather than Part B, generally would govern whether parents are liable for loss, theft, or damage due to negligence or misuse of publicly owned equipment used at home or in other settings in accordance with a child's IEP.

Changes: No change has been made to this section in response to these comments. However, § 300.308 has been amended, consistent with the above discussion.

Child With a Disability (§ 300.7)

Comment: A number of commenters requested that the definition of developmental delay be consistent across both Part B and the early intervention program under Part C. The commenters stated that defining the term consistently across all age ranges will help to avoid confusion, enhance transition, and conform to diagnostic procedures. Other commenters requested that States not be allowed to establish their own definitions of developmental delay because of the risk of inequitable services across State lines.

Several commenters requested that children with sensory disabilities (such as deafness or blindness) not be included under the developmental delay designation, because a sensory disability is a permanent condition and not a delay. Some commenters requested that LEAs be required to justify, through assessment and elimination of specific disabilities, why a child is identified as developmentally delayed. One of the commenters stated that LEAs must be required to include assessment of uneven patterns of development as part of the determination of developmental delay, and added that developmental delay should be utilized for individual cases where the child's disability cannot be identified, although delays are manifested in the child.

A few commenters recommended that the regulations make clear that (1) the broad definition of developmental delay must not be used to deny proper evaluations, and (2) a full, comprehensive evaluation of each child must be conducted in all areas of suspected disability so that the child's particular educational and other disability-related needs can be effectively addressed.

Some commenters disagreed with the language in Note 2 prohibiting States that have adopted developmental delay from requiring LEAs to also adopt the provision, since LEAs, as agents of the State, may be directed by the State to enforce what the State has adopted. Other commenters recommended that the regulations make clear that an LEA is not required to indicate why a child is in a developmental delay category rather than in a disability category, and that an LEA is not required to categorize the child as having one of the thirteen disabilities before using the developmental delay designation.

Discussion: The term "developmental delay" is a statutory term that is included in both Parts B and C of the Act. A definition of developmental delay, substantially similar to the definition in § 300.7(a)(2) of the NPRM, should be retained in these final regulations. Because of the numerous questions raised by commenters about the application of this definition, it is determined that a new paragraph describing requirements governing the use of the developmental delay designation should be added to these final regulations as § 300.313. In light of these changes, the definition of "developmental delay" would be placed in paragraph (b) of § 300.7 of these final regulations, and paragraph (b) of this section of the NPRM would be redesignated as a new paragraph (c).

Also, in light of the general decision not to use notes in these final regulations, Notes 2 and 3 following this section of the NPRM should be removed, and the substance of these notes would be incorporated into the new § 300.313. This new section will (1) set out the requirements for States and LEAs in using the developmental delay designation; (2) clarify that States and LEAs may use the developmental delay designation for any child who has an identifiable disability, provided all of the child's identified needs are addressed; and (3) clarify that a State may, but is not required to, adopt a common definition of developmental delay for Parts B and C.

States electing to adopt the term developmental delay are not prohibited from also continuing to use the disability categories in § 300.7(a) and (c) for those children who have been evaluated in accordance with §§ 300.530–300.536 as having one of the listed disabilities and who because of that disability need special education and related services. Although States traditionally have had the authority to require LEAs to adopt State policies, new section 602(3)(B) of the Act, unlike the provision in prior law, provides that implementation of the provision related to serving children under the developmental delay designation is at the discretion of both the State *and* the LEA. New § 300.313 reflects this statutory change.

Under the statute, States also have the discretion to apply the term developmental delay to children who have an identified sensory disability (such as deafness or blindness) or any other permanent condition (such as a significant cognitive disability), or to use the specific categories. However, States must ensure that children with sensory impairments or other permanent conditions are evaluated in all areas of suspected disability, and that the educational and other disability-related needs of these children identified through applicable evaluation procedures are appropriately addressed.

It is important to ensure that the broad definition of developmental delay is not used to deny children proper evaluations. In all cases, evaluations must be sufficiently comprehensive to ensure that children's needs are appropriately identified. The provisions in §§ 300.530–300.536 of these regulations should ensure that evaluations of children in States and LEAs that use the developmental delay designation are sufficiently comprehensive to address the full range of these children's needs. It would not be appropriate to require public agencies to justify why a child is identified as developmental delay rather than under one of the other disability designations in these regulations.

Changes: Section 300.7 has been amended by adding a new paragraph (a)(2) to clarify that if a child has one of the disabilities listed in paragraph (a) of this section but only needs a related service and not special education that child is not a *child with a disability* under this part, unless the related service is considered special education rather than a related service under State standards. Paragraph (a)(2) of the NPRM has been redesignated as paragraph (b) of these final regulations, entitled "children aged three through nine experiencing developmental delays," which incorporates the definition in § 300.7(a)(2)(i) and (ii) of the NPRM; and a new § 300.313 has been added that clarifies the circumstances under which the DD designation is used, reflecting the substance of proposed § 300.7(a)(2)(iii) and Notes 2 and 3 to this section of the NPRM. Notes 2 and 3 to this section of the NPRM have been deleted. Paragraph (b) of the NPRM has been redesignated as paragraph (c) in these final regulations.

Comment: A variety of comments proposing various changes in definitions was received regarding the terms "deaf-blindness," "emotional disturbance," "hearing impairment," "multiple disability," "speech or language impairment," "mental retardation," "orthopedic impairment," "specific learning disability," "traumatic brain injury," and "visual impairment including blindness." Other commenters supported the existing definitions but suggested some modifications. Some commenters stated that the term deaf-blindness, as defined in the NPRM, mistakenly labels these children's disability as causing educational problems as if the child is a burden to the system. These commenters requested that the definition be amended to replace "problems" with "needs". The commenters made the same statement with respect to the term "multiple disability."

Discussion: In light of the general decision not to use notes in these final regulations, Note 1 to this section of the NPRM should be removed. While the characteristics of "autism" are generally evident before age three, a child who manifests characteristics of the category "autism" after age three still can be evaluated as having autism, if the criteria in the definition are satisfied. Because of the importance of this clarification, the definition of autism in § 300.7(c)(1) should be amended to incorporate the substance of Note 1 to this section of the NPRM. While there is merit to many of the proposed changes to definitions and terms, modifications to the substance of existing definitions should be subject to further review and discussion before changes are proposed. For example, as indicated in the preamble to the NPRM (62 FR 55026–55048 (Oct 22, 1997)), the Department plans to carefully review research findings, expert opinion, and practical knowledge over the next several years to determine whether changes should be proposed to the procedures for evaluating children suspected of having specific learning disabilities. Any changes to the definition of this term should also be considered in light of that review.

As indicated in the NPRM, no substantive changes are made to the definition of the term "emotional disturbance" in § 300.7(c)(4). With respect to the use of the term "emotional disturbance" instead of "serious emotional disturbance," the Senate and House committee reports on Pub. L. No. 105-17 include the following statement:

> The Committee wants to make clear that changing the terminology from "serious emotional disturbance" to "serious emotional disturbance [hereinafter referred to as 'emotional disturbance']" in the definition of a "child with a disability" is intended to have no substantive or legal significance. It is intended strictly to eliminate the pejorative connotation of the term "serious." It should in no circumstances be construed to change the existing meaning of the term under 34 CFR § 300.7(b)(9) as promulgated September 29, 1992. (S. Rep. No. 105-17, p. 7; H.R. Rep. No. 105-95, p. 86 (1997).)

In light of the general decision not to use notes in these final regulations, Note 4 to this section of the NPRM should be removed. In response to suggestions of commenters, the definitions of deaf-blindness and multiple disability should be revised to eliminate the negative connotation of the language in the current definitions, and the word "needs" should replace the word "problems." However, these changes, in no way, are intended to alter which children are considered eligible under these categories.

Changes: Note 1 to this section of the NPRM has been removed, and the definition of "autism" in § 300.7(c)(1) of these final regulations has been amended to specify that if a child manifests characteristics of "autism" after age three, the child could be diagnosed as having "autism" if the criteria in the definition of "autism" are satisfied. The definitions of deaf-blindness and multiple disability have been revised to replace "problems" with "needs."

Note 4 to this section of the NPRM has been removed, and the substance of Note 4 is reflected in the above discussion.

Comment: A large number of commenters expressed support for retaining Note 5, and agreed with the clarification that attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) are conditions that may make a child eligible under § 300.7. As an alternative, these and other commenters suggested that ADD/ADHD be listed as examples of conditions that could make a child eligible under the "other health impairment" category at § 300.7(c)(9). A few commenters requested that ADD/ADHD be specified as a separate disability category under these regulations. Many of these commenters, parents of children with ADD/ADHD, described the tremendous problems they have had, and are having, in obtaining appropriate services for their children. Of particular concern to these commenters was that ADD/ADHD is not expressly listed in the regulations; additionally, commenters were concerned that discussing ADD/ADHD in a note would not be adequate. One commenter noted that the regulations should clarify that a disabled child needs only one, not two, disabilities in order to be eligible under these regulations. A few commenters recommended that schools not require an additional evaluation for a child with ADD/ADHD under other health impairment once the child has been diagnosed and has qualified under another disability category, noting that schools have placed burdens on children and their families by requesting that ADD/ADHD be re-diagnosed by using different procedural qualification requirements when the child with ADD/ADHD moves from one qualifying category (such as learning disabilities or emotional disturbance) to the other health impairment category.

Other commenters requested that Note 5 be deleted because it exceeds statutory authority and would increase the regulatory burden on LEAs by giving the false impression that children with ADD/ADHD are automatically protected by the IDEA Amendments of 1997. Some of these commenters stated that children with ADD/ADHD may be eligible for services under the Act, and, if they are eligible, are receiving services, but added that it is not appropriate to enumerate in the Act or regulations all conditions, e.g., Tourette's Syndrome, that may qualify children for special education and related services. Other commenters indicated that the definition of ADD/ADHD is so vague it fits all children, and added that the most damaging potential abuse comes from over-identification of poor and minority children who will get the label and the reduced expectations that accompany it. Some commenters stated that the discussion in Note 5 of "limited alertness" as "heightened alertness" is exceptionally loose and could result in the largest expansion of eligible children in IDEA history.

Several commenters stated that the diagnosis of ADHD/ADHD does not require a medical evaluation if the disability is diagnosed by a school or licensed psychologist, and the need for special education is determined through the eligibility process in §§ 300.534-300.535. A suggestion was made by commenters that the regulations emphasize that educational impact must be the basis for determining eligibility of those children for special education because, according to commenters, at least 25 percent of the children referred for evaluation, who had been diagnosed medically as ADD/ADHD, were experiencing few, if any, educational problems at the time of their referrals.

Discussion: Note 5 following § 300.7 was included in the NPRM to reflect the Department's longstanding policy memorandum relating to the eligibility of children with ADD/ADHD. However, although some of the commenters who favor deleting Note 5 indicate that some children with ADD/ADHD are receiving services under these regulations, experience and the numerous comments received have demonstrated that the Department's policy is not being fully and effectively implemented.

It is important to take steps to ensure that children with ADD/ADHD who meet the criteria under Part B receive special education and related services in the same timely manner as other children with disabilities. Therefore, the definition of "other health impairment" at § 300.7(c)(9) of these final regulations should be amended to add ADD/ADHD to the list of conditions that could render a child eligible under this definition, and the list of conditions in § 300.7(c)(9) should be rearranged in alphabetical order. Following the phrase "limited strength, vitality or alertness," and prior to the phrase, "that adversely affects educational performance," the words "including a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment" should be added.

These changes are needed to clarify the applicability of the "other health impairment" definition to children with ADD/ADHD. The clarification with respect to "limited strength, vitality, or alertness" is essential because many children with ADD/ADHD actually experience heightened alertness to environmental stimuli, which results in limited alertness with respect to their educational environment. In light of these regulatory changes, Note 5 to this section of the NPRM should be removed as a note, and other portions of Note 5 are reflected in the following discussion. A child with ADD/ADHD may be eligible under Part B if the child's condition meets one of the disability categories described in § 300.7, and because of that disability, the child needs special education and related services. Children with ADD/

ADHD are a very diverse group; some children with ADD/ADHD who are eligible under Part B meet the criteria for "other health impairments." Those children would be classified as eligible for services under the "other health impairments" category if (1) the ADD/ADHD is determined to be a chronic health problem that results in limited alertness, that adversely affects educational performance, and (2) special education and related services are needed because of the ADD/ADHD. All children with ADD/ADHD clearly are *not* eligible to receive special education and related services under these regulations, just as all children who have one of the other conditions listed under the other health impairment category are not necessarily eligible (e.g., children with a heart condition, asthma, diabetes, and rheumatic fever).

Some children with ADD/ADHD may be eligible under other categories, such as "emotional disturbance" (§ 300.7(c)(4)) or "specific learning disability" (§ 300.7(c)(10)) if they meet the criteria under those categories. Regardless of what disability designation is attached, children with ADD/ADHD meeting the criteria for any of the listed disabilities under these regulations must receive the specialized instruction and related services designed to address their individualized needs arising from the ADD/ADHD. No child is eligible for services under the Act merely because the child is identified as being in a particular disability category. Children identified as ADD/ADHD are no different, and are eligible for services only if they meet the criteria of one of the disability categories in Part B, and because of their impairment, need special education and related services.

Other children with ADD/ADHD may have a diagnosed medical condition (and need medication) but may not require any special education or otherwise be eligible under these regulations. These children may be covered by the requirements of section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation in 34 CFR Part 104.

With respect to commenters' suggestions that the diagnosis of ADD/ADHD does not require a medical evaluation if the disability is diagnosed by a school or licensed psychologist, a change is not needed in these regulations. Also, it would not be appropriate to make a change to respond to commenters' suggestion that a medical evaluation is required for a child with ADD/ADHD to establish eligibility under the other health impairment category. Part B does not require that a particular type of evaluation be conducted to establish any child's eligibility under these regulations; rather, the evaluation requirements in §§ 300.530–300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child.

In accordance with these procedures, if a determination is made that a medical evaluation is required in order to determine whether a child with ADD/ADHD is eligible for services under Part B, such an evaluation must be conducted at no cost to the parents. In all instances, as is true for all children who may be eligible for services under Part B, each child with ADD/ADHD who is suspected of having a disability must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (§ 300.532(g)).

There is no requirement under these regulations that a medical evaluation be conducted to accomplish these assessments. Even if a State requires that a medical evaluation be included as part of all evaluations to determine eligibility for the other health impairment category, it must also ensure that any necessary evaluations by other professionals, such as psychologists, are conducted and considered as part of the eligibility determination process. Whether or not public agencies will be required to conduct an additional evaluation for a child with ADD/ADHD under other health impairment once the child has been evaluated and has qualified under another disability category will depend on whether sufficient evaluation information exists to enable school district officials to ensure, consistent with § 300.532(g), that each child is assessed in all areas of suspected disability.

Because these determinations will necessarily depend on the individual needs of the child and the circumstances surrounding the evaluation, a change is not needed.

With respect to the concern of commenters that the most damaging potential abuse from the definition will be the over-identification of poor and minority children, there is no indication that children from minority backgrounds have been disproportionately identified as ADD/ADHD even as the numbers of children in this category have increased. Further, the definition of ADD/ADHD is not so loose that it could result in the largest expansion of eligible children in IDEA history. As previously stated, many children with ADD/ADHD are not eligible under Part B. If appropriate evaluations are conducted in accordance with §§ 300.530–300.536, the result of the evaluations should be the inclusion of only those children with ADD/ADHD who are eligible for, and have an entitlement to, special education and related services under Part B.

Changes: The definition of "other health impairment" at § 300.7(c)(9) has been amended to add ADD/ADHD to the list of conditions that could render a child eligible under this definition, and the list of conditions in § 300.7(c)(9) has been rearranged in alphabetical order. Following the phrase "limited strength, vitality, or alertness," and prior to the phrase, "that adversely affects educational performance," the words "including a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment" have been added to clarify the applicability of the other health impairment definition to children with ADD/ADHD. Note 5 to this section of the NPRM has been removed.

Day; Business Day; School Day (§ 300.9)

Comment: Some commenters indicated support for the definition of "day" as written. Many commenters requested that the term be revised to define "school day" and "business day," since these are key terms that are used throughout the Act and regulations. Some of the commenters recommended similar definitions of the terms, "school day" and "business day" (e.g., "school day" means days when children are attending school and "business day" means days when a school is open for business and administrative personnel are working). One definition proposed by commenters included staff development day as a school day. Several commenters asked when a partial day might be considered a "day," if inservice or staff development days are considered business days, and what holidays are to be used, as school districts and States vary in this regard. Other commenters requested that there be no reference to "calendar day" or "day," but that instead the definitions of "school day" and "business day" be incorporated into these regulations. Some of the commenters indicated that the use of "calendar day" can place an impractical time standard on school systems when actions are required and a school may not be open for business.

Discussion: It is necessary, to avoid confusion and ensure clarity, to amend the definition of "day" to include definitions of both "school day" and "business day." Both "school day" and "business day" are used to implement new provisions added by Pub. L. 105-17: The term "school day" is used only with respect to discipline procedures and appears in §§ 300.121(c)(1) and (c)(2), and 300.520(a)(1) and (c). The term "business day" is used in §§ 300.509(b) (Additional disclosure of information requirement); 300.520(b) (Authority of school personnel); and 300.528(a)(1) (Expedited due process hearing). In addition, the phrase "business days (including holidays that fall on a business day)" is used in § 300.403(d)(1)(ii) (Placement of children by parents in a private school or facility if FAPE is at issue.)

"School day" means any day that children are in attendance at school for instructional purposes. If children attend school for only part of a school day and are released early (e.g., on the last day before Christmas or summer vacation) that day would be considered to be a school day. However, it is expected that the term "school day," including partial school day, has the same meaning for all children in school, including children with and without disabilities.

The term "business day" is used in the statute and regulations in relation to actions by school personnel and parents. While school personnel could reasonably be expected to know when administrative staff are working, very often this information is not readily available to parents, nor is it likely to be consistent from one LEA to another, or from the SEA to an LEA. If "business day" were interpreted to be days when school offices are open and administrative staff are working, it could actually be impossible for parents to know with any certainty the date in advance of a due process hearing on which they would have to share evidence to be introduced at the hearing with the other party to the hearing (see § 300.509). Therefore, this term is interpreted to be a commonly understood measure of time, Monday through Friday except for Federal and State holidays, unless holidays are specifically included, as in § 300.403(d)(1)(ii).

Including definitions of "school day" and "business day" will reduce confusion about the meaning of these terms and should facilitate meeting the various timelines in the Act and regulations.

The definition of "day," while that term was not previously defined in the regulations, represents the Department's longstanding interpretation that the term "day" means calendar day. (*See,* e.g., NPRM published August 4, 1982, 47 FR 33836-33840 describing the 30-day time line from determination of eligibility to initial IEP meeting as "30 calendar days.") This interpretation is consistent with generally-recognized authority on statutory interpretation. (*See Sutherland Stat. Const.* § 33.12 (5th Ed.)). In addition, the statute itself uses three different terms, "day," "business day," and "school day," so it would be inappropriate to interpret "day" to be the same as either "business day" or "school day."

Finally, altering the interpretation of "day" from the longstanding interpretation as "calendar day" would raise significant concerns about compliance with the terms of section 607(b) of the Act, especially as to timelines that affect the rights of parents and children with disabilities such as (1) the timeline in § 300.343 (relating to holding an initial IEP meeting for a child), and (2) the procedural safeguards in Subpart E, including § 300.509(a)(3) (hearing rights—timeline for disclosure of evidence); § 300.511(a) and (b) (timelines for hearings and reviews); and § 300.562(a) (access rights relating to records).

There also are other provisions in these regulations that include timelines that have always been interpreted to be calendar day timelines—including the (1) 30-day public comment period in § 300.282, (2) by-pass procedures under Subpart D, (3) notice and hearing procedures in §§ 300.581-300.586 that the Department uses before determining that a State is not eligible under Part B, and (4) 60-day timeline under the State complaint procedures in § 300.661. The majority of those timelines have been in effect since 1977, and, in light of the clear distinction in the IDEA Amendments of 1997 between days, school days, and business days, there is no basis for changing other timelines in the regulations.

Changes: The name of the section in the NPRM has been changed to "Day; business day; school day" in these final regulations. Definitions of "school day" and "business day" have been added to reflect the above discussion.

Educational Service Agency (§ 300.10)

Comment: None.

Discussion: The definition of "educational service agency" in § 300.10 of these final regulations adopts the statutory definition of this term in section 602(4) of the Act. This definition replaces the definition of the term "intermediate educational unit" (IEU) in § 300.8 of the current regulations. The use of the term "educational service agency" was not intended to exclude those entities that were considered IEUs under prior law. This interpretation is supported by the legislative history, which makes explicit that most definitions in prior law have been retained, and, where appropriate, updated. S. Rep. No. 105-17 at 6., and H.R. Rep. No. 105-95 at 86. With respect to "educational service agency," the Reports explain that this definition has been updated "to reflect the more contemporary understanding of the broad and varied functions of such agencies." *Id.*

Although there were no comments regarding this definition, the application of the term "educational service agency" to entities covered under the definition of IEU in prior law has been questioned. The definition of IEU did not refer explicitly to public elementary and secondary schools. However, the definition of "educational service agency" makes specific references to an entity's administrative control over public elementary and secondary school. This definition could be misinterpreted as excluding from the educational service agency definition those entities in States that serve preschool-aged children with disabilities but do not have administrative control and direction over a public elementary or secondary school. Therefore, to avoid any confusion about the use of this new terminology, a statement should be added to the definition to clarify that the term "educational service agency" includes entities that meet the definition of IEU in section 602(23) of IDEA as in effect prior to June 4, 1997.

Changes: Consistent with the above discussion, a statement has been added at the end of the definition to clarify that the definition of "educational service agency" includes entities that meet the definition of IEU in section 602(23) of IDEA as in effect prior to June 4, 1997.

Equipment (§ 300.11)

Comment: One commenter stated that the reference to "books, periodicals, documents, and other related materials" be deleted from § 300.10(b) because materials and equipment are accounted for differently in the budget. A few commenters recommended that the definition of "equipment" be amended to add that (1) any instructional or related materials be provided in accessible formats, as appropriate; and

(2) any technological aids and services be accessible.

Discussion: The definition of "equipment" is a standard statutory definition that is used in most elementary and secondary education programs funded by the Department. Therefore, efficient administration of Federal programs would not be served by revising the definition in the ways suggested by the commenters. In appropriate situations, public agencies are required by section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act (ADA) to ensure that instructional or related materials are provided in accessible formats and that technological aids and services are accessible to students with disabilities or can be made accessible, to afford students with disabilities an equal opportunity to participate in their programs.

Changes: None.

General Curriculum

Comment: Several commenters indicated support for the definition of "general curriculum," and for the note clarifying that the term relates to the content of the curriculum and not the setting in which it is used. Some commenters stated that, as written, the definition should preclude any likelihood of the "general curriculum" being identified with the "low" track.

Some commenters recommended that the substance of the note be integrated into the definition or made other suggestions to strengthen the idea that the general curriculum applies to children with disabilities wherever they are educated. Other commenters disputed that there is a "general curriculum," pointing to the variety of common courses offered by many school districts, the need of some children for a functional life-skills curriculum or the needs of students in alternative programs (e.g., moderate disabilities, significant or profound, autism, etc.) who may be pursuing an alternative certificate rather than a diploma. Other commenters requested that the definition be dropped from the final regulations, because it (1) sets a dangerous precedent for the Federal government to dictate what the general curriculum should be in each school, and (2) violates the General Education Provisions Act.

Discussion: The concept of "general curriculum" in these regulations plays a crucial role in meeting the requirements of the Act. The IDEA Amendments of 1997 place significant emphasis on the participation of children with disabilities in the general curriculum as a key factor in ensuring better results for these children.

The definition in § 300.12 would not have imposed a national curriculum, but only clarified what the statutory term "general curriculum" means. As the term is used throughout the Act and congressional report language, the clear implication is that, in each State or school district, there is a "general curriculum" that is applicable to all children. A major focus of the Act—especially with respect to the new IEP provisions—is ensuring that children with disabilities are able to be involved in and progress in the "general curriculum." For example, the Senate and House committee reports on Pub. L. No. 105-17 state that—

> [t]he new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to have access to the general education curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability. (S. Rep. No. 105-17, p. 20; H.R. Rep. No. 105-95, p. 100 (1997)).

Even as school systems offer more choices to students, there still is a common core of subjects and curriculum areas that is adopted by each LEA or schools within the LEA, or, where applicable, the SEA, that applies to all children within each general age grouping from preschool through secondary school. Appropriate access to the general curriculum must be provided. The development and implementation of IEPs for each child with a disability must be based on having high, not low, expectations for the child.

In light of the concerns of the commenters and the principle of regulating only to the extent necessary, proposed § 300.12 should be removed from the final regulations. Instead the regulations should emphasize the importance of the "general curriculum" concept in the IEP provision under which the term is used.

Changes: The definition of "general curriculum" in § 300.12 of the NPRM and the note following that section of the NPRM have been deleted. The term is explained where it is used in § 300.347 and in Appendix A regarding IEP requirements.

Individualized Education Program Team (§ 300.16)

Comment: None.

Discussion: In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed. However, it is important to clarify that the IEP team may also serve as the placement team.

Changes: The note following this section of the NPRM has been removed.

Local Educational Agency (§ 300.18)

Comment: A number of commenters expressed concern about the note on public charter schools following § 300.17 of the NPRM, stating that it provides an inadequate and too limited explanation of the responsibilities of those schools under these regulations (i.e., it focuses only on public charter schools that are "LEAs" under State law and excludes public charter schools that are defined by State law as being part of an LEA).

Some of the commenters requested that the note be modified to clarify that public charter schools must comply with these regulations whether or not they receive Part B funds. Commenters believe that this clarification is particularly important because, according to the commenters, services to disabled children in some public charter schools have been dismantled, and parents have been asked to waive their children's rights under Part B as a condition of enrollment in the schools.

Other commenters requested that the note be dropped and that § 300.241 (Treatment of public charter schools and their students) clarify that all charter schools must comply with the requirements of Part B of the Act. The commenters added that this action would consolidate all public charter school requirements into one regulatory provision. A few commenters requested that the regulations include a provision requiring that LEAs in which charter schools are physically located describe to the State how they will ensure that children with disabilities receive special education and related services under this part, even when the charter school is not otherwise under the jurisdiction of the LEA.

Discussion: In light of the general decision not to use notes in these final regulations, the note following § 300.17 of the NPRM should be removed. However, it should be pointed out that the proposed note was inadequate and did not provide a full explanation of the responsibilities of public charter schools under these regulations.

In light of concerns raised about how public charter schools could meet their obligations to disabled students under Part B and obtain access to Part B funds for disabled students enrolled in their schools, two important provisions were included in the IDEA Amendments of 1997 at section 613(a)(5) and (e)(1)(B).

Some public charter schools can be LEAs if, under State law, they meet the

Part B definition of LEA. As a result of section 613(e)(1)(B) of the Act, public charter schools that are LEAs may not be required to apply for Part B funds jointly with other LEAs, unless explicitly permitted to do so under the State charter school statute. However, in many instances, charter schools are schools within LEAs. If this is so, section 613(a)(5) of the Act provides that the LEA of which the public charter school is a part must serve those disabled students attending public charter schools in the same manner as it serves students with disabilities in its other public schools and must provide Part B funds to charter schools in the same manner that it provides Part B funds to other public schools.

Still, in other instances, due to the provisions in States' charter school statutes, some public charter schools are not considered LEAs or a school within an LEA. In such instances, the SEA would have ultimate responsibility for ensuring that Part B requirements are met. Regardless of whether a public charter school receives Part B funds, the requirements of Part B are fully applicable to disabled students attending those schools. The legislative history of the IDEA Amendments of 1997 makes explicit that Congress "expects that public charter schools will be in full compliance with Part B." *See* S. Rep. No. 105-17 at 17; H.R. Rep. No. 105-95 at 97.

Therefore, based on the concerns expressed by commenters and for the reasons clarified in the above discussion, it is determined that (1) the definition of LEA should be amended to clarify that the term "LEA" includes a public charter school established as an LEA under State law; (2) the provision in § 300.241 (Treatment of charter schools and their students) should be retained in these final regulations; and (3) a new § 300.312, entitled "Children with disabilities in public charter schools," should be added to these final regulations.

The new section makes clear that children with disabilities and their parents retain all rights under these regulations and that compliance with Part B is required regardless of whether a public charter school receives Part B funds. Thus, charter school personnel, for example, may not ask parents to waive their disabled child's right to FAPE in order to enroll their child in the charter school. This new section also would address the responsibilities of (1) public charter schools that are LEAs, (2) LEAs if a charter school is a school in the LEA, and (3) the SEA if a charter school is not an LEA or a school in an LEA.

Changes: The note has been removed. The definition of LEA has been amended by adding after "secondary school" the words "including a public charter school that is established as an LEA under State law." A new § 300.312 has been added to further address the treatment of charter schools.

Native Language (§ 300.19)

Comment: Some commenters requested that, in item (1) under the note, the Department change "child" to "student"; add "combination of languages" used by the student; and add "in the home and learning environments." A few commenters requested additional specificity in item 2 to clarify that the mode of communication used should be that used by the individual.

Discussion: In light of the general decision not to use notes in these final regulations, the note following § 300.18 of the NPRM should be removed. However, it is critical that public agencies take the necessary steps to ensure that the needs of disabled children with limited English proficiency (LEP) are adequately addressed. The term "native language" is used in the prior notice, procedural safeguards notice, and evaluation sections: §§ 300.503(c), 300.504(c), and 300.532(a)(1)(ii).

In light of concerns of commenters and the need to ensure that the full range of the needs of children with disabilities whose native language is other than English is appropriately addressed, the definition of "native language" in the NPRM should be expanded in these final regulations to clarify that (1) in all direct contact with the child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two; and (2) for individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual (such as sign language, Braille, or oral communication).

These changes to the regulatory definition of "native language" should enhance the chances of school personnel being able to communicate effectively with a LEP child in all direct contact with the child, including evaluation of the child.

Changes: The definition of "native language" in the NPRM has been amended to reflect the concepts contained in the note following that definition, and the note has been removed.

Parent (§ 300.20)

Comment: Several commenters indicated that (1) based on the definition of "parent" in the NPRM, States would be required to change their laws to include foster parents under the State definition of "parent," and (2) language should be added to the NPRM so that foster parents can serve as parents, unless prohibited from doing so under State law.

These and other commenters also requested that

(1) the language in the note be included in the text of the regulations;

(2) a provision be added to the effect that the public agency must continue to afford the natural parents all protections of this part if their rights to make educational decisions have not been extinguished, even if the child does not live with the natural parents and even if other persons appear to be acting as the child's parents;

(3) the legal parent have the authority, not a grandparent or other person, unless parental authority is extinguished;

(4) "legal" be added in front of "guardian"; and

(5) all references to "parent" in these regulations be changed to "the child's parent." Some commenters felt that the note created a problem for school districts because a situation often arises where a child is living with a person acting as a parent, while the natural parents are still involved and have not had their rights terminated, and requested clarification for school districts in these situations.

Discussion: States should not have to amend their laws relating to parents in order to treat "foster parents" as parents. Therefore, conditional language in this regard is necessary if State law prohibits a foster parent from acting as a parent. This change would accomplish the intended effect of the provision (i.e., acknowledging that in some instances foster parents may be recognized as "parents" under the Act) without adding any burden to individual States whose State statutory provisions relating to parents expressly exclude foster parents.

In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed, but the substance of the note on foster parents should be added to the text of the regulations. Under these regulations, the term "parent" is defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom the child lives, as well as persons who are legally responsible for a child's welfare, and, at the discretion of the State, a foster parent who meets the requirements in paragraph (b) of this section. Commenters' concerns related to ensuring that the rights of natural parents are protected in a case in which a disabled child is living with a person acting as a parent, or providing that the parent retain authority even if a child is living with a grandparent, raise questions that the Department has traditionally held best to be left to each State to decide as a matter of family law.

It is not necessary to add "legal" before the word "guardian" since the statute regarding the term "parent" at section 602(19)(A) merely notes that it includes a legal guardian. A legal guardian would be considered to meet the regulatory definition of "parent". The regulatory definition of "parent" has always included more than just the term identified in the statute. An inclusive definition of parent benefits public agencies by reducing the instances in which the agency will have to bear the expense of providing and appointing a surrogate parent (see § 300.515) and benefits children with disabilities by enhancing the possibility that a person with ongoing day-to-day involvement in the life of the child and personal concerns for the child's interests and well-being will be able to act to advance the child's interests under the Act.

Regarding the use of the reference to the child's parent, no change is needed since it is implicit that the rights under Part B are afforded to a child with a disability and his or her parents, as defined under these regulations.

Changes: The note following the definition of "parent" in the NPRM has been removed; and the substance of the note has been reflected in the above discussion. The definition of "Parent" in these final regulations has been amended to permit States in certain circumstances to use foster parents as parents under the Act without amending relevant State statutes.

Public Agency (§ 300.22)

Comment: Some commenters requested that the definition of "public agency" be amended to include "charter schools" that are created under State law and are the recipients of public funds, because as proposed, a public agency would not include any charter school that is not an LEA or most of the nation's existing charter schools. Other commenters stated that, in order to support the provision on assistive technology under § 300.308, the definition of "public agency" must be amended to include other State agencies, since the proposed definition of "public agency" includes only the SEA, not other State agencies which arguably could be used to try to circumvent financial responsibility based on this omission.

Discussion: Public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA should be added to the definition of "public agencies" in order to ensure that all public entities responsible for providing education to children with disabilities are covered. However, the definition of "public agency" should not be amended to address financial responsibility for assistive technology. If another State agency is responsible for providing education to children with disabilities, it is already included in the definition of "public agency." Other State agencies, not responsible for educating children with disabilities, should not be held to the requirements imposed on public agencies by these regulations because they are not agencies with educational responsibilities.

Changes: Public charter schools as discussed previously has been added to the list of examples of a "public agency" in § 300.22.

Qualified Personnel (§ 300.23)

Comment: Numerous commenters stated that the definition of "qualified" should be renamed "qualified personnel," updated to the highest standard, and should be cross-referenced to the exception to the maintenance of effort provision" in the regulations. Some commenters requested that the definition be changed to link the term "qualified" to the statutory and regulatory provisions on personnel standards, i.e., the SEA standards that are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements based on the highest requirements in the State applicable to the profession or discipline in which a person is providing special education or related services. These commenters also stated that the more detailed definition is important to ensure that, under the exception to maintenance of effort in § 300.232, qualified lower-salaried staff who replace higher-salaried staff have met the highest requirements in the State consistent with § 300.136.

Other commenters, with similar recommendations, requested that the name of the section be changed to "Qualified professionals and qualified personnel," and that a note be added to explain the basis and importance of qualified professionals. Several commenters requested that the definition be amended to require that personnel providing services to limited English proficient students meet SEA requirements for bilingual specialists in the language of the child or student.

Some commenters requested that the regulations be clarified to address qualifications for interpreters serving children who are deaf or have hearing impairments.

Discussion: It is appropriate to change the title of this section of these final regulations to "qualified personnel." This change is consistent with the importance of ensuring that all providers of special education and related services, including interpreters, meet State standards and Part B requirements.

In order for interpreters to provide appropriate instruction or services to children with disabilities who require an interpreter in order to receive FAPE, States must ensure that these individuals meet appropriate State qualification standards.

It is not necessary to refer to § 300.136, as the definition already specifies that the person must meet State-approved or recognized requirements. Section 300.232 (exception to maintenance of effort), uses the term "qualified" in referring to the replacement of higher-salaried personnel by qualified lower-salaried personnel. Therefore it would be unnecessary and redundant to include a reference to that section.

The definition of "qualified personnel" is sufficiently broad to encompass the qualifications of bilingual specialists, and no further changes are required in this definition.

Changes: The name of this section has been changed to "Qualified personnel," and a corresponding reference to "qualified personnel" has been included in the text of the definition.

Related Services (§ 300.24)

Comment: A number of comments were received relating to the general definition of "related services" under § 300.22(a) of the NPRM, and to Note 1 following that section of the NPRM. These comments included revising § 300.22(a) consistent with the definition in the statute, and adding services to the definition of related services; for example, assistive technology devices and services, school nursing services, travel training, and educational interpreter services. Some of these commenters stated that interpreter services are of utmost importance for deaf students to succeed in the educational setting and are essential for hearing impaired students to function in the mainstream. A few commenters requested that "qualified sign language interpreting" be added, including the definition of the term from the ADA.

One commenter stated that a note should be added that related services not only can be used to ameliorate the disability but also to work toward independence and employability.

Several commenters recommended that changes be made in Note 1. Some of the commenters expressed concern about adding additional services (travel training, nutrition services, and independent living services) to an already lengthy list of services. Some commenters requested that the note be deleted because it is too expansive, or that the parenthetical phrase in the first paragraph be dropped because the listing is confusing without some further explanation or clarification. One comment stated that the menu of related services suggests that a disabled child might need all of the listed services. Other commenters stated that inclusion of terms such as dance therapy and nutrition is confusing, and that further clarification is needed as to how they are "related" to the student's access to special education and to making progress in the general curriculum.

Some commenters requested that "artistic and cultural programs" be deleted from the parenthetical statement in Note 1, stating (for example) that (1) these programs are areas of the curriculum and not related services (i.e., they are not necessary for a child to benefit from special education), and (2) ensuring that disabled children have an equal opportunity to participate in the type of cultural activities available to all children is different than considering those programs to be a related service "therapy" that implies specific certification requirements in many sectors.

A number of commenters requested that the statement that psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists depending on State standards be deleted from the second paragraph of Note 1. One comment stated that there is no national standard for this role, and thus it conflicts with evaluation requirements and personnel standards. Other commenters recommended that the third paragraph in Note 1 be amended to provide that the activities do not act to reduce the amount of the service specified by any child's IEP as necessary for FAPE.

Discussion: In light of the general decision not to use notes in these final regulations, Note 1 following this section of the NPRM should be removed, but the substance of the note is reflected in the following discussion. All related services may not be required for each individual child. As under prior law, the list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, art, music, and dance therapy) if they are required to assist a child with a disability to benefit from special education in order for the child to receive FAPE. Therefore, if it is determined through the Act's evaluation and IEP requirements that a child with a disability requires a particular supportive service in order to receive FAPE, regardless of whether that service is included in these regulations, that service can be considered a related service under these regulations, and must be provided at no cost to the parents.

The IEP process in §§ 300.340–300.350, and the evaluation requirements in §§ 300.530–300.536, are designed to ensure that each eligible child under Part B receives only those related services that are necessary to assist the child to benefit from special education, and there is nothing in these regulations that would require every disabled child to receive all related services identified in the regulations, as suggested by some commenters.

Commenters' suggestions that the second paragraph of Note 1 to this section of the NPRM is no longer needed should be addressed. The statement in Note 1—that "psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists depending on State standards"—should not be retained, since States must establish their own qualification standards for persons providing special education and related services. Therefore, State standards would govern which individuals should administer these tests, consistent with Part B evaluation requirements.

As stated in the discussion under §§ 300.5 and 300.6 of this analysis, assistive technology devices and services may already be considered a related service. Therefore, it is not necessary to add assistive technology devices and services to the list of related services defined in this section. Second, because "school health services" is currently defined as services provided by a "qualified school nurse" or other qualified person, there is no reason to address further the issue of "school nurses" or school nursing services. Third, although interpreter services for children with hearing impairments are not specifically mentioned in the definition of related services, those services have been provided under these regulations since the initial regulations for Part B were issued in 1977. (See also discussion under Qualified personnel).

Regarding commenters' suggestions that related services are required not only to ameliorate the disability but to provide preparation for employment, a change is not needed. The Act's transition services requirements are sufficiently broad to facilitate effective movement from school to post-school activities, and if deemed appropriate by the IEP team, these transition services could be identified as related services for an individual student.

Changes: Note 1 following the definition of "related services" in the NPRM has been removed.

Comment: A number of commenters requested changes in the definitions of specific terms defined in the definition of "related services," as follows:

Some commenters recommended that the definition of "audiology" be modified to include functions that are not contained in the current definition. Some commenters requested that the definition of "occupational therapy" be amended to add language to ensure that occupational therapy services are provided by qualified occupational therapists or occupational therapy assistants to ensure that those services can assist children to participate in the general curriculum, and achieve IEP/IFSP goals.

A number of commenters recommended that the final regulations clarify that orientation and mobility services may be required by children with other disabilities, and that the services may be provided by personnel with different qualifications other than those serving persons who are blind or visually impaired. Other commenters requested that (1) the term "qualified personnel" should be deleted because using this term in this definition creates personnel problems for rural areas and for many urban settings, that orientation and mobility personnel are not used for all purposes listed, and not every State has a classification called orientation and mobility specialist; and (2) the option of providing orientation and mobility services in a student's home would apply to students who may not be home-schooled and would violate the least restrictive environment requirements of the Act.

Several comments were also received on Note 2 (relating to orientation and mobility services and travel training). Some commenters requested that travel training be added as a separate related service with its own definition. The definition would be based on, or incorporate, the language from Note 2 relating to travel training. Other commenters suggested that it would be more accurate to refer to this type of training as mobility training.

A number of commenters requested that Note 2 be deleted because it was too expansive. Other commenters stated that (1) all references to travel training be dropped, since the term is not defined or even mentioned in the statute; (2) Note 2 expands services beyond the statute and will make orientation and mobility services extremely expensive and adversarial by requiring new personnel that are not available in rural areas and many urban areas; (3) Note 2 should not require a deliverable standard against which a school system might be held liable; and (4) travel training may be appropriate for other children with disabilities, but orientation and mobility specialists are not the personnel to provide these services.

With respect to parent counseling and training, commenters recommended that (1) the title be changed to "Parental training" because the definition describes training, and schools cannot counsel parents as a related service; and (2) a training element be added at the end of the definition, to provide for assisting parents to acquire the necessary skills to help support the implementation of their child's IEP or IFSP. Other commenters proposed a specific definition of parent counseling and training that would emphasize helping parents to acquire the necessary skills to support the implementation of their child's IEP or IFSP. Another commenter recommended adding a note that training may include training in sign language or other forms of communication.

Several commenters requested that the definition of "school health services" at § 300.22(b)(12) of the NPRM be expanded to specifically include health care services that are not curative or treatment oriented, such as suctioning, gastronomy, tube feeding, blood sugar testing, catheterization, and administration of medication.

A few commenters requested that the definition of "school health services" be amended to add the three-part test adopted by the United States Supreme Court in *Irving Independent School District* v. *Tatro*, 484 U.S. 883 (1984). In *Tatro*, the Court stated that services affecting both the educational and health needs of a child must be provided under IDEA if: (1) The child is disabled so as to require special education; (2) the service is necessary to assist a disabled child to benefit from special education (thus, services which could be provided outside the school day need not be provided by the school, regardless of how easily a school could provide them); and (3) a nurse or other qualified person who is not a physician can provide the service. The commenters believe that by stating the *Tatro* holding in the regulation, longstanding Department policy would be formalized and litigation would decrease. Other commenters requested that the regulations clarify that specialized school health services should not be improperly or dangerously performed by individuals who lack the requisite training and supervision.

Discussion: The definition of "audiology" should not be amended since the changes suggested by commenters are more than technical changes, and thus would require further study and regulatory review. However, in response to suggestions of commenters, it is appropriate to modify the definition of "occupational therapy" to make it clear that this term encompasses services provided by a qualified occupational therapist. This makes the definition generally consistent with the other related service definitions. It is not necessary to incorporate the term "certified occupational therapy assistant," because the option of using paraprofessionals and assistants to assist in the provision of services under these regulations is addressed in § 300.136(f).

As stated by the commenters, some children with disabilities other than visual impairments need travel training if they are to safely and effectively move within and outside their school environment, but these students (e.g., children with significant cognitive disabilities) do not need orientation and mobility services as that term is defined in these regulations. "Orientation and mobility services" is a term of art that is expressly related to children with visual impairments, and includes services that must be provided by qualified personnel who are trained to work with those children. No further changes to the definition of "orientation and mobility services" are needed, since the definition as written does not conflict with the Act's least restrictive environment requirements.

For some children with disabilities, such as children with significant cognitive disabilities, "travel training" is often an integral part of their special educational program in order for them to receive FAPE and be prepared for post-school activities such as employment and independent living. Travel training is important to enable students to attain systematic orientation to and safe movement within their environment in school, home, at work and in the community. Therefore, the definition of "special education" should be amended to include a provision relating to the teaching of travel training, as appropriate, to children with significant cognitive disabilities, and any other disabled children who require such services. The regulations should not substitute the term "mobility training," since the legislative history (S. Rep. No. 105–17, p. 6; H.R. Rep. No. 105–95, p. 86) recognizes that "orientation and mobility" services are generally recognized as for blind children while children with other disabilities may need travel training. In light of this regulatory change, Note 2 following this section of the NPRM should be removed.

The definition of "parent counseling and training" should be changed to recognize the more active role acknowledged for parents under the IDEA Amendments of 1997 as participants in the education of their children. Parents of children with disabilities are very important participants in the education process for their children. Helping them gain the skills that will enable them to help their children meet the goals and objectives of their IEP or IFSP will be a positive change for parents, will assist in furthering the education of their children, and will aid the schools as it will create opportunities to build reinforcing relationships between each child's educational program and out-of-school learning.

For these reasons, the definition of "parent counseling and training" should be changed to include helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP. This change is in no way intended to diminish the services that were available to parents under the prior definition in these regulations.

It is not necessary to modify the definition of "school health services" in the NPRM to add more specificity because the current definition requires provision of health services, including those addressed by the comments, if they can be provided by a qualified nurse or other qualified individual who is not a physician, and the IEP team determines that any or all of the services are necessary for a child with a disability to receive FAPE. The commenters' description of the holding in the *Tatro* decision is consistent with the Department's longstanding interpretation regarding school health services.

In any case, the list of examples of related services in § 300.22 is not exhaustive, and other types of services not specifically mentioned may be required related services based on the needs of an individual child. The only type of service specifically excluded from "related services" are medical services that are not for diagnostic and evaluation purposes. "Medical services," has always been defined by the regulations as services provided by a physician. The regulations already make clear that providers of school health services, as is the case for providers of special education and related services in general, must be qualified consistent with §§ 300.23 and 300.136 of these regulations.

Changes: Consistent with the above discussion, the definitions of "occupational therapy" at § 300.24(b)(5) of these final regulations and "parent counseling and training" at § 300.24(b)(7) of these final regulations have been revised; Note 2 has been deleted; and a reference to travel training has been added under § 300.26 (Special education).

Comment: Numerous comments were received relating to "psychological services." Many of these comments addressed the role of school psychologists under this part (e.g., stating that a psychologist should be a member of the evaluation team, be involved in IEP meetings, and conduct behavioral assessments). A few commenters recommended that "other mental health services" be added at the end of proposed § 300.22(b)(9)(v), stating that this would ensure that schools use, and families have access to, a variety of strategies and interventions that go beyond psychological counseling. The commenters added that children and families have been denied these necessary mental health services because these services are not specifically stated.

Some commenters expressed concern about the provision in the NPRM that designated school psychologists and school social workers as the personnel responsible for assisting in the development of positive behavioral interventions and strategies for IEP goal development. These commenters stated that, although psychologists and school social workers may participate in actions relating to student behavior, this function is too critical to be listed under a specific category of related services. A few of these commenters stated that specifically linking development of positive behavioral interventions and strategies could be interpreted narrowly and result in excluding a broad array of other professionals (such as school counselors and teachers) who may know the students best. A number of commenters favored retaining the provision in the NPRM. One commenter recommended that the regulations be clarified to include an explicit ban on the use of aversive behavior management strategies under this part.

A few commenters requested that the definition of "recreation" in proposed § 300.22(b)(10) be eliminated. One commenter indicated that the definition will overreach the intent of IDEA. Others stated that (1) the services listed would add costs to IDEA as well as administrative burden because those services would be difficult to arrange and schedule, and (2) participation in community-based recreation is a family responsibility. A few commenters requested that the definition of rehabilitation counseling be amended to add that counseling should be provided on the basis of individual need and not on a specific disability category. The commenters stated that because vocational rehabilitation was provided under the transition grants for students with significant disabilities, some school systems consider vocational rehabilitation for these students only.

Some commenters also recommended that the definition of "social work services in schools" be broadened to include individual and group counseling and other mental health services. A few commenters requested that proposed § 300.22(b)(13)(iii) be revised to require that school social work services include working in partnership with parents on those problems in a child's living situation (home, school and community) that affect the child's adjustment in school. Other commenters requested that a new paragraph (vi) be added to the list of functions relating to working with classrooms of children to help students with disabilities develop or improve social skills, self esteem, and self confidence. (See also the comment and discussion under "psychological services" related to the role of psychologists and social workers in the development of positive behavioral interventions and strategies for IEP goal development.)

One commenter recommended that the function "Provision of speech and language services for the habilitation or prevention of communication impairments" be deleted from proposed § 300.22(b)(14)(iv), because it includes vague language, making the program more litigious and more difficult to administer.

Discussion: The definition of "psychological services" in the NPRM is sufficiently broad to enable psychologists to be involved in the majority of activities described by commenters, and, therefore, the definition should not be revised to add other, more specific functions.

Nor is there a need to make substantive changes to the definition of "social work services in schools." Although psychologists (and school social workers) may be involved in assisting in the development of positive behavioral interventions, there are many other appropriate professionals in a school district who might also play a role in that activity. The standards for personnel who assist in the development of positive behavioral interventions will vary depending on the requirements of the State. Including the development of positive behavioral interventions in the descriptions of potential activities under social work services in schools and psychological services provide examples of the types of personnel who assist in this activity. These examples of personnel who may assist in this activity are not intended to imply either that school psychologists and social workers are automatically qualified to perform these duties or to prohibit other qualified personnel from serving in this role, consistent with State requirements.

Regarding the comment requesting clarification to impose a ban on aversive behavior under this part, the new requirements in section 614(d)(3)(B)(i) of the Act are sufficient to address this concern by strengthening the ability of the IEP team to address the need for positive behavioral interventions in appropriate situations. Under these new requirements, the IEP team must "consider, if appropriate, including in the IEP of a student whose behavior impedes his or her learning or that of others, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." These new requirements are sufficiently broad to address the commenter's concerns. In meeting their obligations under section 614(d)(3)(B)(i) of the Act, public agencies must ensure that qualified personnel are used, and may select from a variety of staff for this purpose.

The definition of "social work services in schools" should not be expanded to include group counseling and other mental health services, since under the definition as written, social workers could provide these services if doing so would be consistent with State standards and the students required such services in order to receive FAPE. However, the technical change in § 300.22(b)(13)(iii) should be made to clarify that school social workers work in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school. The current definition is sufficiently broad to enable school social workers to help disabled students work on social skills.

Recreation should not be deleted from the list of related services. This is a statutory provision that has been defined in the regulations since 1977.

The commenters' request relating to "rehabilitation counseling" (i.e., to add clarification that it should be provided based on individual need) is generally the case with all related services. Adding a specific limitation to rehabilitation counseling could inappropriately suggest that other services are to be provided without regard to individual need.

The definition of "speech-language pathology services" should not be revised. This is a longstanding definition that is useful to qualified speech-language pathologists who provide services to children with disabilities under these regulations.

Changes: A technical change has been made to the definition of "social work services in schools."

Comment: A few commenters supported Note 3 (relating to the use of paraprofessionals). Some commenters recommended that the note be amended by requiring proper training and supervision in the areas in which paraprofessionals are providing services.

Commenters also stated that the regulations must (1) ensure parents know which services are provided by paraprofessionals; (2) clarify the service limitations of paraprofessionals; (3) prohibit any independent development, substantive modification or unapproved provision of services independent of the supervising related services professional; (4) ensure that paraprofessionals are not used for IEP decision-making activities or development or revisions of the child's interventions or IEP; and (5) ensure these precautions are part of the policy requirements of § 300.136(f).

Other commenters requested that paraprofessionals who assist in providing speech-language pathology services must be supervised by a person who meets the highest requirements in the State for that discipline.

Discussion: In light of the general decision not to use notes in these final regulations, Note 3 following this section should be removed. When paraprofessionals are used to assist in the provision of special education and related services under these regulations, they must be appropriately trained and supervised in accordance with State standards. Since concerns raised by commenters about the use of paraprofessionals and assistants are addressed in the analysis of comments under § 300.136(f) of this attachment, it is not necessary to make further changes to this section.

Changes: Note 3 to this section of the NPRM has been removed.

Comment: Several comments were received on Note 4 relating to the definition of "transportation." Some commenters recommended that the note be revised to include accommodations to achieve integrated transportation, including providing appropriate training to transportation providers, such as bus drivers, and including the use of aids.

A few commenters stated that the second sentence in Note 4 implies that there is no limit to the adaptations that a school must make to bus equipment to afford a disabled child an opportunity to ride the regular bus. The commenters added that (1) the IEP team must retain the authority to determine the appropriate mode of transportation based on child's needs and financial and logistical burdens of various options, and (2) as with other related services, transportation must only be provided to assist a child with disabilities to benefit from special education.

A number of commenters stated that transportation accommodations are an LRE issue and, as such, should be determined by each child's IEP team. These commenters added that accommodations also should be addressed through section 504 and the ADA, and recommended that the note be deleted. Another commenter recommended the need to clarify public agency responsibility to provide necessary transportation to disabled children even if that transportation is not provided to nondisabled children.

Other commenters also recommended that Note 4 be deleted. One commenter stated that the note goes beyond the statute and adds costs in an outrageous extension of Federal authority. Another commenter stated that the note could lead school districts to conclude that they had to buy specialized equipment (e.g., lifts) for even more of their buses in order to provide integrated transportation, a concept found nowhere in the Act.

Discussion: In light of the general decision not to use notes in these final regulations, Note 4 to this section of the NPRM should be deleted. In response to concerns of commenters, each disabled child's IEP team must be able to determine the appropriate mode of transportation for a child based on the child's needs. That team makes all other decisions relating to the provision of special education and related services; and transportation is a specific statutory service listed in the definition of related services.

It is assumed that most children with disabilities will receive the same transportation provided to nondisabled children, unless the IEP team determines otherwise. However, for some children with disabilities, integrated transportation may not be achieved unless needed accommodations are provided to address each child's unique needs. If the IEP team determines that a disabled child requires transportation as a related service in order to receive FAPE, or requires accommodations or modifications to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or accommodations at no cost to the parents. This is so, even if no transportation is provided to nondisabled children.

As with other provisions in these regulations relating to qualified personnel, all personnel who provide required services under this part, including bus drivers, must be appropriately trained.

Changes: Note 4 to this section of the NPRM has been removed, the substance of Note 4 is reflected in the above discussion, and it is further discussed in Appendix A of these final regulations.

Special Education (§ 300.26)

Comment: Some commenters requested that, in implementing the IEP for disabled students in school-funded placements outside of the school district, the cost of trips, phone calls, and other expenses incurred by parents should be covered. Some commenters stated that they are not reimbursed for official long-distance phone calls made regarding their child's needs or for trips to attend special IEP meetings. According to a commenter, one district will pay for the cost of driving the student to school, but not for the cost of the return trip of the parents.

Several commenters requested that the definition of "physical education" in proposed § 300.24(b)(2)(ii) be amended to change "adaptive" to "adapted," because the term was used in the original regulations, and no rationale has been provided for changing it.

Some commenters expressed support for the definition of "specially designed instruction" as written, while other commenters expressed support with modification. Other commenters took exception to the definition, characterizing it as overly prescriptive. Other commenters recommended dropping the reference to methodology, citing case law and the legislative history in support of their view that methodology should not be included in this definition.

A few commenters stated that the definition of "vocational education" in proposed § 300.24(a)(3) was not complete, and requested that it be amended to comply with the definition in the Carl D. Perkins Vocational and Applied Technology Education Act. Other commenters objected to including "vocational education" within the definition of "special education," asserting that there is no statutory authority to do so. Other commenters recommended that some minor modifications be made to the current definition.

A few commenters requested that the regulations clarify the difference between accommodations that do not change the content of the curriculum and modifications that do change it. Other commenters requested that access to the general curriculum be to the maximum extent appropriate for the child. A few commenters recommended adding clarifying language to accommodate the distinction between providing disabled students with a meaningful opportunity to meet the standards and actually meeting the standards, and stated that the Act recognizes this distinction by referencing involvement and progress in the general curriculum.

Some commenters supported the note to proposed § 300.24 (that a related services provider may be a provider of specially designed instruction if State law permits). Other commenters stated that the note should be deleted to eliminate the possibility that individuals may interpret it to mean that the term "child with a disability," as defined under proposed § 300.7, might include children who need only a related service.

Discussion: It is not necessary to revise the definition of "at no cost" under paragraph (b)(1) of this section, since that definition already addresses the comment relating to the cost of trips, phone calls, and other expenses incurred by parents of disabled children when those children are placed outside the school district by a public agency. If the school district places the child, and the IEP team determines that the costs of phone calls and trips are relevant to the student's receipt of FAPE, the public agency placing the child would be expected to pay for such expenses.

Paragraph (b)(2) concerning "physical education" should be amended to substitute the word "adapted" for the word "adaptive," since this is the term that was in the original regulations.

With regard to the definition of "specially designed instruction," some changes should be made. The committee reports to Pub. L. 105-17 make clear that specific day-to-day adjustments in instructional methods and approaches are not normally the sort of change that would require action by an IEP team. Requiring an IEP to include such a level of detail would be overly-prescriptive, impose considerable unnecessary administrative burden, and quite possibly be seen as encouraging disputes and litigation about rather small and unimportant changes in instruction. There is, however, a reasonable distinction to be drawn between a mode of instruction, such as cued speech, which would be the basis for the goals, objectives, and other elements of an individual student's IEP and should be reflected in that student's IEP, and a day-to-day teaching approach, i.e., a lesson plan, which would not be intended to be included in a student's IEP.

Case law recognizes that instructional methodology can be an important consideration in the context of what constitutes an appropriate education for a child with a disability. At the same time, these courts have indicated that they will not substitute a parentally-preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA to meet the educational needs of an individual child with a disability.

In light of the legislative history and case law, it is clear that in developing an individualized education there are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.

Other students' IEPs may not need to address the instructional method to be used because specificity about methodology is not necessary to enable those students to receive an appropriate education. There is nothing in the definition of "specially designed instruction" that would require instructional methodology to be addressed in the IEPs of students who do not need a particular instructional methodology in order to receive educational benefit. In all cases, whether methodology would be addressed in an IEP would be an IEP team decision.

Other changes to the definition of "specially designed instruction" are not needed. The distinction between accommodations that change the general curriculum and those that do not, as one commenter requests, would be difficult to make because of the individualized nature of these determinations. Regardless of the reasons for the accommodation or modification, it must be provided if necessary to address the special educational needs of an individual student.

The words "maximum extent appropriate" should not follow the reference to participation in the general curriculum, because such a qualification would conflict with the Act's IEP requirements and the unequivocal emphasis on involvement and progress of students with disabilities in the general curriculum, regardless of the nature or significance of the disability.

The term "vocational education" in paragraph (b)(5) should not be amended to conform to the definition in the Carl D. Perkins Vocational and Applied Technology Education Act. The definition of "vocational education" in the proposed regulations should be retained in these final regulations since it reflects the definition of that term contained in the original regulations for this program published in 1977. While the regulatory definition includes all of the activities in the Perkins Act definition, the substitution of the definition from the Perkins Act would be too limiting since that definition would not encompass those activities included in the current definition. The inclusion of "vocational education" in the definition of "special education" is needed to ensure that students with disabilities receive appropriate, individually-designed vocational educational services to facilitate transition from school to post-school activities.

In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed. The removal of this note, however, should not be construed as altering eligibility requirements under these regulations—namely (1) a child is an eligible child with a disability under Part B if the child has a covered impairment and requires special education by reason of the impairment; and (2) a child with a disability can receive a related service only if that service is required to assist the child to benefit from special education. However, consistent with § 300.26(a)(2), any related service that is considered special education rather than a related service under State standards may be considered as special education. A provision has been added under the definition of "child with a disability" to reflect this concept.

Changes: Paragraph (a)(2) has been amended to add travel training to the elements contained in the definition of "special education," and a separate definition of travel training has been added to paragraph (b)(4) as discussed in this attachment under § 300.24. Paragraph (b)(2) concerning physical education has been revised to substitute the word "adapted" for the word "adaptive." Paragraph (b)(3) has been revised to make clear that adaptations to instruction, in the form of specially designed instruction, are made as appropriate to the needs of the child. The note following this section of the NPRM has been removed, and the substance of the note is reflected in the above discussion.

Supplementary Aids and Services (§ 300.28)

Comment: A few commenters supported the definition of "supplementary aids and services," as written. Some commenters requested that the regulations define the term "educationally related setting," and that examples of supplementary aids and services be included. Another commenter recommended that the definition be amended to state that related services could be considered supplementary aids and services. Other commenters recommended that assistive technology be considered in the same context as supplementary aids and services.

Discussion: It is not necessary to define the terms used in this definition. As stated in the analysis of comments relating to §§ 300.5 and 300.6 (assistive technology devices and services), assistive technology devices and services are already recognized as supplementary aids and services. Under IDEA, aids, supports and services would be considered during the IEP meeting and if determined appropriate by the IEP team would be integrated under the appropriate components of the IEP. Further, with respect to the language about "related services," a change is not needed. If a disabled child requires a related service in the regular classroom, that related service must be provided, and there is no reason to identify that service as a supplementary aid or service.

Changes: None.

Transition Services (§ 300.29)

Comment: Many commenters supported the transition services definition in these regulations, but recommended that the definition be amended to include, in paragraph (1)(c)(vi), self-advocacy, career planning, and career guidance. This comment also emphasized the need for coordination between this provision and the Perkins Act to ensure that students with disabilities in middle schools will be able to access vocational education funds.

One commenter recommended that the definition of "transition services" either be narrowed to post-school transition or that other transitions, such as transition from Part C to Part B, be defined elsewhere in these regulations.

Discussion: The Act's "transition services" definition should be retained as written. In light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed. It is important to clarify that transition services for students with disabilities may be special education if they are provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education, and that the list of activities in the definition is not intended to be exhaustive.

Additional examples of transition services are not needed because the current definition is sufficiently broad to encompass these activities. Nor is it necessary to amend the definition to reference the Perkins Act, since, under current law, students with disabilities, including those in middle schools, can participate in these Federally-funded programs, and must be provided necessary accommodations to ensure their meaningful participation.

Further, the definition of "transition services" should not be narrowed or expanded to include other transitions, because to do so could be inconsistent with congressional intent that public agencies provide students with disabilities the types of needed services to facilitate transition from school to post-school activities.

Changes: The note following this section of the NPRM has been removed, and the substance of the note has been added as a new paragraph (b).

Subpart B

Condition of Assistance (§ 300.110)

Comment: A few commenters stated that the proposed regulations at §§ 300.110–300.113, as written, would not ensure that States meet the requirements of section 612(a) and (c) of the Act.

Discussion: It is appropriate to amend § 300.110 to more explicitly state what is required for compliance with these provisions.

Changes: Section 300.110 has been amended, as noted in the above discussion.

Free Appropriate Public Education (§ 300.121)

(For a brief overview of the changes made regarding the discipline sections of these regulations, please refer to the preamble.)

Comment: A few commenters asked that the regulations be amended to adopt a "no cessation of services" policy, under which students with disabilities would be entitled to receive FAPE even during periods of less than ten days of suspension in a given school year. Some of these commenters stated that there is no basis to assume that Congress did not mean what is explicitly stated in section 612(a)(1)(A) of the Act—that all children are entitled to FAPE, including children who have been suspended or expelled from school.

A few commenters expressed support for the proposed language which defines the term "children with disabilities who have been suspended or expelled from school" as meaning children with disabilities who have been removed from their current educational placement for more than 10 school days in a given school year, but asked that the regulations clarify that the 10 school days are cumulative, not consecutive.

Several commenters recommended deleting the phrase "in a given school year," stating that the statute allows school personnel to suspend a disabled child for not more than ten *consecutive* school days without the provision of educational services, and that there is no statutory basis for defining 10 school days to be within a given year. A number of commenters supported the proposed "11th day" rule (i.e., that the right to FAPE for disabled children who have been suspended or expelled begins on the eleventh school day in a school year that they are removed from their current educational placement). Other commenters recommended deleting proposed § 300.121(c)(2). Some of these commenters stated that they agreed with the Supreme Court decision in *Honig* versus *Doe* and with the Department's long-standing interpretation of the Act—that a pattern of suspensions would constitute a change in placement, but objected to the regulations defining when the "11th day" occurs.

One commenter asked whether the provisions of proposed § 300.121(c) would apply if a child's disability is not related to the behavior in question. Some commenters were concerned that the standard from § 300.522 would be unwieldy for short-term suspensions or should be modified to permit different services for children suspended or expelled for behavior determined not to be a manifestation of their disability. Another commenter recommended strengthening the language of § 300.121 to ensure that the SEA is responsible for ensuring the provision of FAPE for children who are suspended or expelled.

Discussion: Section 612(a)(1)(A) of the Act now makes explicit that FAPE must be available to children with disabilities who are suspended or expelled, in light of the adverse impact a cessation of educational services can have on a child with disabilities ability to achieve in school and to become a self-supporting adult who is contributing to our society. The Act, however, should not be read to always require the provision of services when a child is removed from school for just a few days. School officials need some reasonable degree of flexibility when dealing with children with disabilities who violate school conduct rules, and interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with disabilities right to FAPE.

On the other hand, at some point repeated exclusions of a child with disabilities from the educational process will have a deleterious effect on the child's ability to succeed in school and to become a contributing member of society. The law ensures that even children with disabilities who are engaged in what objectively can be identified as dangerous acts, such as carrying a weapon to school, must receive appropriate services. (See sections 615(k)(1)(A)(ii) and 615(k)(2)).

Therefore, it is reasonable that children with disabilities who have been repeatedly suspended for more minor violations of school codes not suffer greater consequences from exclusions from school than children who have committed the most significant offenses. For these reasons, once a child with a disability has been removed from school for more than 10 school days in a school year, it is reasonable for appropriate school personnel (if the child is to be removed for 10 school days or less, or the child's IEP team, if the child is to be suspended or expelled for behavior that is not a manifestation of the child's disability) to make informed educational decisions about whether and the extent to which services are needed to enable the child to make appropriate educational progress in the general curriculum and toward the goals of the child's IEP.

The change of placement rules referred to in the Supreme Court's decision in *Honig v. Doe,* which is based on the Department's long-standing interpretation of what is now section 615(j) of the Act, are addressed in the discussion of comments received under § 300.520 in this attachment, and changes are made in these final regulations as a result of those comments. However, determining whether a change of placement has occurred does not answer the question of at what point exclusion from educational services constitutes a denial of FAPE under section 612(a)(1)(A) of the Act.

With regard to the standard for services that must be provided to children with disabilities who have been suspended or expelled from school, the statute at section 615(k)(3) specifically addresses only the services to be provided to children who have been placed in interim alternative educational settings under sections 615(k)(1)(A)(ii) and 615(k)(2) (§§ 300.520(a)(2) and 300.521), which contemplate situations in which children are removed for up to 45 days, without regard to whether the behavior is or is not a manifestation of the child's disabilities.

In light of the comments received, the regulation would be revised to recognize that the extent to which services would need to be provided and the amount of service that would be necessary to enable a child with a disability to meet the same general standard of appropriately progressing in the general curriculum and advancing toward achieving the goals on the child's IEP may be different if the child is going to be out of his or her regular placement for a short period of time. For example, a one or two day removal of a child who is performing at grade level may not need the same kind and amount of service to meet this standard as a child who is out of his or her regular placement for 45 days under § 300.520(a)(2) or § 300.521. Similarly, if the child is suspended or expelled for behavior that is not a manifestation of his or her disability, it may not make sense to provide services in the same way as when the child is in an interim alternative educational setting.

As part of its general supervision responsibility under § 300.600, each SEA must ensure compliance with all Part B requirements, including the requirements of § 300.121(d) regarding FAPE for children who are removed from their current educational placement for more than ten school days in a given school year.

Changes: The regulation has been revised to provide that when a child with a disability who has been removed from his or her current educational placement for more than 10 school days in a school year is subjected to a subsequent removal for not more than 10 school days at a time and when a child with a disability is suspended or expelled for behavior that is not a manifestation of the child's disability, the public agency must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in the child's IEP.

In the case of a child who is removed pursuant to § 300.520(a)(1) for 10 school days or less at a time, this determination is made by school personnel, in consultation with the child's special education teacher. In the case of a child whose removal constitutes a change of placement for behavior that is not a manifestation of the child's disability pursuant to § 300.524, this determination is made by the child's IEP team.

The regulation has also been revised to clarify that if a child is removed by school personnel for a weapon or drug offense under § 300.520(a)(2) or by a hearing officer based on a determination of substantial likelihood of injury under § 300.521, the public agency provides services as specified in § 300.522.

Comment: Some commenters expressed support for Note 1 (which clarifies the responsibility of public agencies to make FAPE available to children with disabilities beginning no later than their third birthday) and recommended that the substance of the note be incorporated into the text of the regulations. A few commenters suggested revising Note 1 to clarify that children with disabilities whose third birthday occurs during the summer are not entitled to receive special education and related services until school starts for the fall term.

Discussion: The responsibility of public agencies to make FAPE available to children with disabilities beginning no later than their third birthday means that an IEP (or an IFSP consistent with § 300.342) has been developed and is being implemented for the child by that date, with the IEP specifying the special education and related services that are needed in order to ensure that the child receives FAPE, including any extended school year services, if appropriate. (Section 612(a)(9) of the Act). If a child with a disability is determined eligible to receive Part B services, the public agency must convene a meeting and develop an IEP by the child's third birthday, and must in developing the IEP determine when services will be initiated. For 2-year olds served under Part C, the public agency must meet with the Part C lead agency and the family to discuss the child's transition to Part B services at least 90 days (and, at the discretion of the parties, up to 6 months) before the child turns 3. (See section 637 (a)(8)) of the Act). In order to ensure a smooth transition for children served under Part C who turn 3 during the summer months, a lead agency under Part C may use Part C funds to provide FAPE to children from their third birthday to the beginning of the following school year. (See section 638 of the Act).

Children with disabilities who have their third birthday during the summer months are not automatically entitled to receive special education and related services during the summer, and the public agency must provide such services during the summer only if the IEP team determines that the child needs extended school year services at that time in order to receive FAPE. The substance of Note 1 should be incorporated into the text of the regulation, because it sets forth long-standing requirements that are based on the statute (see analysis of "General Comments" relating to the use of notes under this part).

Changes: The substance of Note 1 has been added to the text of the regulations, and the note has been deleted.

Comment: Some commenters expressed support for Note 2 (regarding the determination of eligibility for children advancing from grade to grade), and recommended that the substance of the note be incorporated into the text of the regulations. A few of the commenters suggested deleting the second sentence of Note 2 (relating to the IEP team) before making the note a regulation. Other commenters recommended that Note 2 be deleted, as it confuses the IEP team with the team that determines eligibility.

Discussion: The revised IEP requirements at § 300.347 require public agencies to provide special education and related services to enable students with disabilities to progress in the general curriculum, thus making clear that a child is not ineligible to receive special education and related services just because the child is, with the support of those individually designed services, progressing in the general curriculum from grade-to-grade. The group determining the eligibility of a child who has a disability and who is progressing from grade-to-grade must make an individualized determination as to whether, notwithstanding the child's progress from grade-to-grade, he or she needs special education and related services. The substance of Note 2, as revised, should be incorporated into the text of the regulation, because it sets forth long-standing requirements that are based on the statute (see analysis of "General Comments" relating to the use of notes under this part).

Changes: Section 300.121 has been revised to incorporate the substance of Note 2, and the note deleted.

Comment: None.

Discussion: To ensure that children with disabilities have available FAPE, consistent with the requirements of this part, it is important for the Department to be able to verify that each State's policies are consistent with their responsibilities regarding important aspects of their obligation to make FAPE available. Therefore, § 300.121(b) should be revised to provide that each State's policy regarding the right to FAPE of all children with disabilities must be consistent with the requirements of §§ 300.300–300.313.

Changes: Section 300.121(b) has been revised to provide that the States' policies concerning the provision of FAPE must be consistent with the requirements of §§ 300.300–300.313.

Exception to FAPE for Certain Ages (§ 300.122)

Comment: Some commenters expressed support for § 300.122(a)(2), which sets forth an exception to the FAPE requirement for certain youth who are incarcerated in adult correctional facilities, and Note 2 which includes clarifying language from the House Committee Report. A few commenters wanted the regulation to clarify the responsibility of a State where reasonable efforts to obtain prior records from the last reported educational placement have been made, but no records are available. The commenter also requested adding a note to clarify that, even if State law does not require the provision of FAPE to students with disabilities, ages 18 through 21, who, in the last educational placement prior to their incarceration in an adult correctional facility were not identified as a child with a disability and did not have an IEP under Part B of the Act, the State may choose to serve some individuals who fit within that exception and include those individuals within its Part B child count.

Discussion: Before determining that an individual is not eligible under this part to receive Part B services, the State must make reasonable efforts to obtain and review whatever information is needed to determine that the incarcerated individual had not been identified as a child with a disability and did not have an IEP in his or her last educational placement prior to incarceration in an adult correctional facility. The steps a State takes to obtain such information may include a review of records, and interviewing the incarcerated individual and his or her parents.

A State may include in its Part B child count an eligible incarcerated student with a disability to whom it provides FAPE, even if the State is permitted under § 300.122(a)(2) and State law to exclude that individual from eligibility. It is not necessary to provide additional clarification regarding these issues in the regulations.

Proposed Note 2 quoted from the House Committee Report on Pub. L. 105–17 which, with respect to paragraph (a)(2) of this section (relating to certain students with disabilities in adult prisons), stated that:

> The bill provides that a State may also opt not to serve individuals who, in the educational placement prior to their incarceration in adult correctional facilities, were not actually identified as a child with a disability under section 602(3) or did not have an IEP under Part B of the Act. The Committee means to* * *make clear that services need not be provided to all children who were at one time determined to be eligible under Part B of the Act. The Committee does not intend to permit the exclusion from services under part B of children who had been identified as children with disabilities and had received services under an IEP, but who had left school prior to their incarceration. In other words, if a child had an IEP in his or her last educational placement, the child has an IEP for purposes of this provision. The Committee added language to make clear that children with disabilities aged 18 through 21, who did not have an IEP in their last educational setting but who had actually been identified should not be excluded from services. (H. R. Rep. No. 105–95, p. 91 (1997))

The concepts in this note are important in the implementation of this program. Appropriate substantive portions of the note should be clarified and included in the regulations. Consistent with the decision to not include notes in these final regulations, the note should be removed.

Changes: Section 300.122(a)(2) has been revised by adding appropriate substantive portions of Note 2 to the text of the regulation, to specify situations in which the exception to FAPE for students with disabilities in adult prisons does not apply.

Comment: Some commenters expressed support for § 300.122(a)(3) (which provides that the obligation to make FAPE available does not apply to students with disabilities who have graduated from high school with a regular high school diploma), and Note 1 (which clarifies that graduation with a regular high school diploma is a change of placement requiring notice and reevaluation), and recommended that the substance of the note be included in the text of the regulation. Other commenters requested that § 300.122(a)(3) and Note 1 be deleted because there is no statutory basis for these regulatory interpretations. Several commenters stated that, in most States, graduation is dependent on a student's having met specific standards (State, local, or both).

A few commenters stated that some States have developed procedures for disabled students to graduate with a diploma based on the IEP, and recommended that the term "regular" be deleted from § 300.122(a)(3). Other commenters recommended deleting the language about graduating with a regular high school diploma, and added that many States have, with public input, established multiple graduation diplomas and certificates. Other commenters recommended deleting the provision, and added that some States are shifting from diplomas to certificates of mastery based on what students know. A few commenters stated that receipt of a diploma or age 21 is the only reason for termination of eligibility, and, therefore, the requirement is redundant and should be deleted.

Many commenters recommended deleting Note 1, stating that graduation is not a change of placement, and that reevaluation is not necessary and should not be required. These commenters stated the basis for their recommendation by adding that: (1) With the addition of the new IEP requirements such as benchmarks, reporting to parents, and examination of transition needs at age 14, the reevaluation requirement becomes redundant; (2) if the parents and student are provided notice of the impending graduation and the IEP team concurs, the additional step of reviewing current data and determining the nature and scope of a reevaluation is unnecessary and will consume staff time and resources; and (3) if parents believe their child should not graduate, they have procedural avenues available to contest the graduation.

A few commenters stated that § 300.122(a)(3) should not be interpreted as prohibiting a State from using Part B funds to serve students aged 18 through 21 who have attained a regular diploma but who are still in the State-mandated age range.

Discussion: Because the rights afforded children with disabilities under IDEA are important, the termination of a child's eligibility under Part B is equally important. When public agencies make the determination as to whether the Part B eligibility of a student with a disability should be terminated because the student has met the requirements for a regular high school diploma or that the student's eligibility should continue until he or she is no longer within the State-mandated age of eligibility, it is important to ensure that the student's rights under the Act are not denied.

As the comment notes, a number of the new IEP requirements focus increased attention on how children with disabilities can achieve to the same level as nondisabled children. In implementing these new requirements, it is important that the parents, participating in decisions made in developing their child's IEP—including decisions about their child's educational program (e.g., the types of courses the child will take) and the child's participation in State and district-wide high stakes assessments—understand the implications of those decisions for their child's future eligibility for graduation with a regular diploma.

The commenters persuasively point out that, there is a less burdensome way to protect the interests of students with disabilities under the Act whose eligibility for services is ending because of graduation with a regular diploma or because they are no longer age eligible. If an eligibility change is the result of the student's aging out or receipt of a regular high school diploma, the statutory requirement for reevaluation before a change in a student's eligibility under section 614(c)(5) should not be read to apply.

Graduation with a regular high school diploma ends a student's eligibility for Part B services, and is, therefore, a change in placement requiring notice under § 300.503 a reasonable time before the public agency proposes to graduate the student. The new requirements for transition planning and for reporting to parents regarding the progress of their child, together with the notice to them regarding proposed graduation, are sufficient to ensure that parents are appropriately informed to protect the rights of their child. The parents would have the option, as with any public agency proposal to change the educational program or placement of a child with a disability, to seek to resolve a disagreement with the proposal to graduate the student through all appropriate means, including mediation and due process hearing proceedings.

Exiting or graduating a student with a disability with a credential that is different from the diploma granted to students who do not have disabilities does not end an individual's eligibility for Part B services, and is not a change in placement requiring notice under § 300.503. The second paragraph of proposed Note 1 clarified that if a high school awards a student with a disability a certificate of attendance or other certificate of graduation instead of a regular high school diploma, the student would still be entitled to FAPE until the student reaches the age at which eligibility ceases under the age requirements within the State or has earned a regular high school diploma. This clarification is consistent with the statute and final regulations. However, consistent with the decision to not include notes in the final regulations, the note should be deleted.

An SEA or LEA may elect to use Part B funds for services for a student with a disability who has graduated with a regular high school diploma but who is still within the State-mandated age range for Part B eligibility, but may not include the student in its Part B child count. For children aged 19 through 21, eligibility for services is a matter of State discretion.

Changes: Section 300.122(a)(3) has been revised to make clear that graduation from high school with a regular diploma is a change in placement requiring notice in accordance with § 300.503. Section 300.534(c), also has been revised to clarify that a reevaluation is not required before the termination of a student's Part B eligibility due to graduation with a regular high school diploma, or ceasing to be age-eligible under State law. Note 1 has been removed.

Child Find (§ 300.125)

Comment: A few commenters expressed support for the statutory provision reflected in § 300.125(c), which states that nothing in the Act requires that children be classified by their disability. Some commenters believed that § 300.125(c) is inconsistent with § 300.125(b)(3), which requires a description of the policies and procedures that the State will use to obtain the number of children by disability category, and § 300.751, which requires the reporting of data by disability category.

Some commenters recommended that Note 2 (which states that the services and placement needed by each child with a disability must be based upon the child's unique needs and may not be determined or limited based upon a category of disability) be incorporated into the regulations. Other commenters recommended deleting the phrase "and may not be determined or limited based upon a category of disability," so as not to conflict with § 300.346(a)(2)(iii) (consideration of special factors relating to children who are blind or visually impaired). Other commenters stated that Note 2 should be deleted because it deals with services and placements, rather than child find.

A few commenters requested that the regulations clarify the child find requirements for children birth through age 3, because the requirements under Parts B and C are different, and it is not clear which must be followed. One commenter recommended that Note 3 (which describes the link between child find under Parts B and C) be incorporated into the regulations because it promotes interagency coordination. Other commenters stated that Note 3 is unnecessary and should be deleted because the text of § 300.125 sufficiently covers the statutory requirement.

Some commenters expressed support for Note 4 (relating to highly mobile children, such as the homeless and migrant children). A few commenters requested more guidance related to a State's obligation to migrant children. Other commenters stated that States are already doing their best to find these children, but added that it is (1) virtually impossible to meet fully an obligation to ensure that all of these children are found, and (2) extremely difficult to obtain accurate data on these populations.

Discussion: Section 300.125(c), which clarifies that the Act does not require public agencies to label children by disability, is not inconsistent with the data reporting requirements in §§ 300.125(b)(3) and 300.751. The statement in Note 2—that the services and placement needed by each child with a disability may not be determined or limited based upon a category of disability—is crucial in implementing both the child find and FAPE requirements. Thus, the substance of the note has been included in this discussion, and has been incorporated in the text of the regulations at § 300.300(a)(3)(ii). Specifying that services and placement not be determined or limited based on category of disability is not incompatible with the special considerations related to children who are blind and visually impaired.

It is clear, without the need for further clarification in the regulations, that the child find and evaluation procedures under Part C must be followed when the purpose is to locate, identify and evaluate infants and toddlers with disabilities who may be eligible for early intervention services under that Part, and that the child find and evaluation procedures under Part B must be followed when the purpose is to locate, identify and evaluate children with disabilities who may be eligible for special education and related services under that part.

Note 3 provided needed clarification of long-standing statutory requirements, under Parts B and C regarding the respective responsibilities of the SEA and Part C lead agency for child find activities. In States in which the SEA and Part C lead agency are different, each agency remains responsible for ensuring that the child find responsibilities under its program are met, even if the agencies, through an interagency agreement, delegate to one agency the primary role in child find for the birth through two population. When different, the SEA and Part C lead agency are encouraged to cooperate to avoid duplication and ensure comprehensive child find efforts for the birth through two population. The substance of the note should be incorporated into the text of the regulation.

Although it is difficult to locate, identify, and evaluate highly mobile children with disabilities, it is important to stress that the States' child find responsibilities under § 300.125 apply equally to such children and that the substance of Note 4 should be added to the text of § 300.125(a).

Changes: The substance of Notes 1, 3, and 4 has been added to the text of the § 300.125; the substance of Note 2 has been added to the text of § 300.300(a)(3)(ii); and the four notes have been deleted.

Procedures for Evaluation and Determination of Eligibility (§ 300.126)

Comment: A few commenters requested that the regulation specify best practices for evaluation and the determination of eligibility.

Discussion: The use of best practices in all educational programs and activities in order to help ensure that all children, including children with disabilities, are prepared to meet high standards is, of course, strongly encouraged, and the Department funds many programs to identify and disseminate best practices. Section 300.126, however, addresses the eligibility requirements relating to evaluation and the determination of eligibility that States must meet, rather than best practices.

Changes: None.

Confidentiality of Personally Identifiable Information (§ 300.127)

Comment: None.

Discussion: In the NPRM, § 300.127 included a note that contained a reference to the Family Education Rights and Privacy Act (FERPA) in 34 CFR Part 99. There is a clear relationship between the confidentiality requirements in IDEA and those in FERPA. The regulations in §§ 300.560—300.577 are drawn directly from the FERPA regulations.

Changes: Consistent with the decision to eliminate notes from the final regulations, the note following this section has been removed.

Least Restrictive Environment (§ 300.130)

Comment: A few commenters requested that "State-approved private schools and facilities" be added to the list of placement options included in the continuum, as set forth in the note following § 300.130.

A few commenters were concerned that the proposed regulations did not include the State eligibility requirement, set forth in the prior regulations at § 300.132(b), that each State include in its State plan the number of children within each disability category who are participating in regular education programs, and the number of children with disabilities who are in separate classes or separate school facilities or otherwise removed from the regular education environment.

A few commenters stated that the note and § 300.551 should be deleted; they assert that there is no requirement in the statute for a continuum, and that the note and the regulation are inconsistent with the statute's strengthened requirement that children with disabilities be integrated.

Discussion: As described in § 300.551(b)(1), the continuum includes the placement option of "special schools." The requested revision regarding State-approved private schools and facilities is, therefore, not necessary. State-approved private schools and facilities are already covered by the continuum.

The requirement in the prior regulations at § 300.132(b), that each State include in its State plan the number of children within each disability category who are participating in regular education programs, and the number of children with disabilities who are in separate classes or separate school facilities or otherwise removed from the regular education environment, was based upon an express provision in the prior statute at section 612(5)(B) that was removed from the statute by the IDEA Amendments of 1997. Those amendments also eliminated the requirement that each State submit a State plan, instead requiring that each State demonstrate eligibility under Part B by having specified policies and procedures on file with the Secretary. The Department will, however, continue to collect data regarding placement in the LRE under section 618 of the Act.

The statute, at section 607(b), prohibits the Secretary from implementing or publishing regulations implementing IDEA that would procedurally or substantively lessen the protections provided to children with disabilities, as set forth in the Part B regulations as in effect on July 20, 1983, including those relating to placement in the least restrictive environment, except to the extent that the revised regulation reflects the clear and unequivocal intent of the Congress in legislation. The provisions of § 300.551 in the NPRM were included in the regulations as in effect on July 20, 1983. Therefore, those provisions must, consistent with section 607(b) of the Act, be retained in the regulations. In fact, the Senate and House Committee Reports on Pub. L. 105–17 support the continuing importance of the continuum provision:

> The committee supports the longstanding policy of a continuum of alternative placements designed to meet the unique needs of each child with a disability. Placement options available include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. For disabled children placed in regular classes, supplementary aids and services and resource room services or itinerant instruction must also be offered as needed. (S. Rep. No. 105–17, p. 11; H. R. Rep. No. 105–95, p. 91 (1997))

The substance of the note is helpful in implementing the LRE requirements, and should be included in the text of the regulations.

Changes: Consistent with the decision to delete notes from the final regulations, the note following § 300.130 in the NPRM has been removed. The substance of the note has been incorporated into paragraph (a) of this section.

Comment: A number of commenters expressed concerns about the provisions of § 300.130(b), regarding the steps that a State must take if it distributes State funds on the basis of the type of setting in which a child is served. Some commenters were concerned that this provision not be implemented in a way that would negatively impact State funding formulas for State schools for the deaf. Other commenters requested that the regulations provide clear guidance as to what a State must do to determine whether its funding mechanism is resulting in placements that violate the least restrictive environment requirements of the Act.

A few commenters asked that the regulations make clear that individual needs, rather than a State's finding mechanism must drive placement decisions, but that a State is not required to change the way in which it distributes State funds to public agencies unless the funding mechanism results in placement decisions that violate Part B's LRE requirements. Other commenters requested that the regulations be revised to require that a State's assurance under § 300.130(b)(2) must specify the steps the State will take by a date certain (no later than the end of the following fiscal year) to revise its funding mechanism.

Discussion: The provisions of § 300.130(b) are unchanged from section 612(a)(5)(B) of the Act. A State is not required to revise a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, unless it is determined that the State does not have policies and procedures to ensure that the funding mechanism does not result in placements that violate the LRE requirements of §§ 300.550–300.556. The Senate and House Committee Reports on Pub. L. 105–17 emphasize the importance of section 615(a)(5)(B), stating that:

> The bill amends the provisions on least restrictive environment * * * to ensure that the state's funding formula does not result in placements that violate the requirement.
>
> The committee supports the long standing policy that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and that special separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (S. Rep. No. 105–17, p. 11; H. R. Rep. No. 105–95, p. 91 (1997)) Further clarification in the regulation is not needed.

Changes: None.

Transition of Children From Part C to Preschool Programs (§ 300.132)

Comment: A few commenters expressed concern regarding the cost of home visits, especially in large geographic areas, that would be needed to implement the transition requirements of § 300.132.

Discussion: The provisions of § 300.132 are drawn from the statutory requirements at section 612(a)(9), and do not set forth any additional requirements. While § 300.132(c) requires that each LEA participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) (which requires the lead agency to convene such a conference), § 300.132 does not require any home visits. Therefore, no revision is necessary.

Changes: None.

Comment: A few commenters requested that the regulation be revised to make clear that the pendency provisions of § 300.514 apply to children transitioning from early intervention services under Part C to preschool special education and related services under Part B.

Discussion: The pendency provision at § 300.514(a) does not apply when a child is transitioning from a program developed under Part C to provide appropriate early intervention services into a program developed under Part B to provide FAPE. Under § 300.514(b), if the complaint requesting due process involves the child's initial admission to public school, the public agency responsible for providing FAPE to the child must place that child, with the consent of the parent, into a public preschool program if the public agency offers preschool services directly or through contract or other arrangement to nondisabled preschool-aged children until the completion of authorized review proceedings.

Changes: None.

Comment: One commenter expressed concern that § 300.132(b) suggests that a program of special education and related services be in place for each child with a disability on his or her third birthday, even if the birthday occurs during the summer and the child does not need extended school year services.

Discussion: Section 612(a)(9) of the Act requires that, by the third birthday of a child with a disability participating in early intervention programs assisted under Part C who will participate in preschool programs assisted under Part B, an IEP or, if consistent with § 300.342(c) and section 636(d) of the

Act, an IFSP, has been developed and must be implemented for the child. This means that if a child with a disability is determined eligible to receive Part B services, the public agency must convene a meeting and develop an IEP by the child's third birthday, and must, in developing the IEP, determine when services will be initiated. Children with disabilities who have their third birthday during the summer months are not automatically entitled to receive special education and related services during the summer, and the public agency must provide such services during the summer only if the IEP team determines that the child needs extended school year services during the summer in order to receive FAPE.

Changes: The regulation has been revised to clarify that decisions about summer services for children who turn three in the summer are made by the IEP team.

Comment: A few commenters requested that the regulation be revised to clarify that representation of an LEA in the transition planning process would most appropriately include all members of the IEP team, in order to further "smooth" the transition process and ensure appropriate attention to the child's needs.

Discussion: Section 612(a)(9) of the Act leaves to each LEA the responsibility to determine who will most appropriately represent the agency in transition planning conferences. The requested revision goes beyond the requirements of the Act.

Changes: None.

Comment: A few commenters requested that a definition of the term "effective" be included in the regulations.

Discussion: It is not necessary to provide a definition of the term "effective," and doing so would restrict the flexibility needed to implement the Act for a very heterogeneous group of children.

Changes: None.

Comment: A few commenters requested that the regulations be revised to require that: (1) the transition planning conference be incorporated into the required timelines under Part B of the Act for determining eligibility and developing an IEP; and (2) LEAs acknowledge and consider existing documentation related to eligibility and service planning prior to conducting an individual evaluation of a child referred from the Part C system.

Discussion: The Part C regulations require, at § 303.148(b)(2), that the lead agency convene, with family approval, a transition planning conference at least 90 days, and at the discretion of the parties, up to 6 months before the third birthday of a toddler receiving early intervention services. The Part B regulations require that an IEP be developed and implemented for children with disabilities by their third birthday. It is inappropriate to specify further timelines in § 300.132. Section 300.533 permits an LEA, if appropriate, to review existing data regarding a child with a disability (including a child who has been referred by the lead agency) as part of an initial evaluation.

Changes: None.

Comment: A few commenters requested that the regulation be revised to emphasize the responsibility of the lead agency to ensure that the LEA receive advance notice of any transition planning conference at which the participation of the LEA is required.

Discussion: The Part C regulations require at § 303.148(b) that the lead agency notify the local educational agency in which a child with a disability resides when the child is approaching the age of three, and convene, with family approval, a transition planning conference which includes the lead agency, the family and the LEA at least 90 days, and at the discretion of the parties, up to 6 months before the child's third birthday. Implicit in these requirements is the requirement that the lead agency inform the LEA early enough so that the LEA can arrange to participate in the conference. Additional clarification in the Part B regulations is not necessary.

Changes: None.

Private Schools (§ 300.133)

Comment: A few commenters requested that the regulations be revised to require each State to include, as part of the policies and procedures that it must have on file with the Secretary in order to establish eligibility under Part B of the Act, the policies and procedures that the State has established to comply with the provisions of § 300.454(b), which requires that each LEA consult with representatives of private school children with disabilities in making determinations regarding the provision of special education and related services to children with disabilities who have been placed by their parents in private schools.

Discussion: Section 300.133 specifically requires that each State "have on file with the Secretary policies and procedures that ensure that the requirements of §§ 300.400–300.403 and §§ 300.450–300.462 are met." Thus, the regulation already requires that the procedures required by § 300.454(b) be included in the policies and procedures that each State must have on file to establish eligibility.

Changes: None.

Comprehensive System of Personnel Development (§ 300.135)

Comment: A few commenters requested that the regulation be revised to require that each State, in developing its comprehensive system of personnel development, consider the need for bilingual special education and assistive technology instructors. Other commenters requested that the regulations be revised to require that special education, regular education, and related services personnel be trained regarding the use of home instruction and the circumstances under which such instruction is appropriate. Other commenters requested that the regulation be revised to require that each State have on file with the Secretary policies and procedures on the equitable participation of private school personnel in staff development, inservice, etc.

Discussion: The CSPD provisions in §§ 300.380–300.382 require each State to develop and implement a CSPD to ensure "an adequate supply of qualified special education, regular education, and related services personnel" (§ 300.380(a)(2)), and that "all personnel who work with children with disabilities * * * have the skills and knowledge necessary to meet the needs of children with disabilities" (§ 300.382). This would include, for example, consideration of the needs of personnel serving limited English proficient students and students who need assistive technology services and devices. The Act and regulations leave to each State the flexibility to determine the specific personnel development needs in the State.

Matters related to the participation of private school staff in inservice training and other personnel development activities are decisions left to the discretion of each State and LEA, and, therefore, should not be addressed under this part.

Changes: None.

Comment: None.

Discussion: The Senate and House committee reports on Pub. L. 105–17, in reference to the CSPD requirements of this section state that:

> Section 612, as [in] current law, requires that a State have in effect a Comprehensive System of Personnel Development (CSPD) that is designed to ensure an adequate supply of qualified personnel, including the establishment of procedures for acquiring and disseminating significant knowledge derived from educational research and for adopting, where appropriate, promising

practices, materials, and technology. (S. Rep. No. 105-17, p. ; H. R. Rep. No. 105-95, p. 93 (1997))

The States will be able to use the information provided to meet the requirement in § 300.135(a)(2) as a part of their State Improvement Plan under section 653 of the Act, if they choose to do so.

Changes: Consistent with the decision to not include notes in the final regulations, the note following this section has been deleted.

Personnel Standards (§ 300.136)

Comment: Commenters made a number of suggestions regarding general modifications to this section. Some commenters expressed concern that in no case should children with disabilities receive services from individuals who do not meet the highest requirements applicable to their professions. Commenters recommended clarification requiring LEAs to ensure that all personnel are adequately trained to meet all the requirements of the IDEA, with emphasis on any requirement on which the LEA has been found by the SEA to be out of compliance, such as the failure to provide necessary assistive technology devices and services.

Some commenters recommended that the definition of "appropriate professional requirements in the State" in § 300.136(a)(1) be amended to include an explicit reference to "professionally-recognized" entry level requirements. Other commenters requested additional clarification regarding the term "highest requirements in the State." Those commenters who interpreted the term as imposing the maximum standard recommended that the definition be amended to specify that every provider of special education and related services must have a doctorate. Some commenters recommended clarification that highest requirements in the State are the minimum requirements established by a State which must be met by personnel providing special education and related services to children with disabilities under Part B.

Numerous comments were received regarding Note 1 to this section of the NPRM, and regarding Note 3 as it relates to paragraphs (b) and (c) of this section. A number of commenters indicated that they had found Note 1 to be extremely useful in understanding the scope of this section; however, other commenters recommended that Note 1 either be deleted entirely, or that the substance of the note be incorporated into the text of § 300.136. While many commenters recommended that Note 3 either be retained as a note or incorporated into the regulations, other commenters recommended that Note 3 be deleted because it would "nullify" the requirements of this section.

Discussion: The substance of § 300.136 of the NPRM has been retained in these final regulations, but the notes have been removed. Section 300.136 incorporates the provisions on personnel standards contained in § 300.153 of the current regulations, with the addition of the new statutory amendments in section 612(a)(15)(B)(iii) and (C) of the Act.

The IDEA Amendments of 1997 do not alter States' responsibilities to (1) establish policies and procedures relating to the establishment and maintenance of standards for ensuring that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, (2) establish their own minimum standards for entry-level employment of personnel in a specific profession or discipline providing special education and related services to children with disabilities under these regulations based on the highest requirements in the State across all State agencies serving children and youth with disabilities, and (3) if State standards are not based on the highest requirements in the State applicable to a specific profession or discipline, take specific steps to upgrade all personnel in that profession to appropriate State qualification standards by a specified date in the future.

Contrary to the suggestion made by commenters, the Act's personnel standards provisions are not intended to be a mechanism for addressing problems that result from the denial of special educational services to children with disabilities under Part B. If an SEA finds that any of its public agencies are out of compliance with the requirements of Part B, the SEA, in accordance with the general supervision requirements of section 612(a)(11) of the Act and § 300.600 of these regulations, must take whatever steps it determines are necessary to ensure the provision of FAPE to children with disabilities who are eligible for services under Part B. In addition, through the comprehensive system of personnel development (CSPD), an SEA must conduct a needs assessment and identify areas of personnel shortages, as well as describe the strategies it will use to address its identified needs for preparation and training of additional personnel necessary to carry out the purposes of Part B.

There is no need to clarify the regulatory definitions of "appropriate professional requirements in the State" in § 300.136(a)(1) or "highest requirements in the State applicable to a specific profession or discipline" in § 300.136(a)(2). Section 300.136 incorporates verbatim the definitions of these terms contained in the current regulations implementing the Act's personnel standards provisions, which were added to Part B by the Education of the Handicapped Act Amendments of 1986, Pub. L. 99-457.

These definitions are consistent with the congressional intent that all personnel in a specific profession or discipline meet the same standards across all State agencies; nevertheless, they still afford States flexibility in determining the steps that must be taken to upgrade all personnel in a specific profession or discipline to meet applicable State qualification standards if the SEA's standard is not based on the highest requirements in the State applicable to the profession. The definition of "highest requirements in the State" is based on the highest entry-level academic degree required for employment in a specific profession or discipline across all State agencies.

As explained in Note 1 to this section of the NPRM, these regulations require a State to use its own existing requirements to determine the standards appropriate to personnel who provide special education and related services under Part B of the Act, and nothing in Part B requires that all providers of special education and related services attain a doctorate or any other specified academic degree, unless the State standard requires this academic degree for entry-level employment in that profession or discipline.

While States may consider professionally-recognized standards in deciding what are "appropriate professional requirements in the State," there is nothing in the statute that requires States to do so. Rather, these matters appropriately are left to States. Therefore, to clarify the extent of flexibility afforded to States in meeting the Act's personnel standards requirements, a new paragraph (b)(3) should be added to these final regulations, and provides, in accordance with Note 1 to this section, that nothing in these regulations requires States to set any specified training standard, such as a master's degree, for entry-level employment of personnel who provide special education and related services under Part B of the Act.

States also have the flexibility to determine the specific occupational categories required to provide special education and related services and to revise or expand those categories as needed. Therefore, the clarification regarding this issue contained in the note to the current regulation should be incorporated as part of paragraph (a)(3) in the definition of "specific profession or discipline."

Despite commenters' concerns that Note 3 would "nullify" the requirements of this section, experience in administering the Act's personnel standards provisions has demonstrated that there is a need to afford States that have only one entry-level academic degree for employment of personnel in a particular profession or discipline the ability to modify that standard if the State determines that modification of the standard is necessary to ensure the provision of FAPE to all children with disabilities in the State. Therefore, the substance of Note 3 should be incorporated into this section as paragraph (b)(4).

Changes: Note 1 has been removed as a note and incorporated, as appropriate, both into the above discussion and into § 300.136. Note 2 has been removed as a note, and, as discussed later in this attachment, the substantive portion of Note 2 has been incorporated into § 300.136(g) of these final regulations. Note 3 has been removed as a note and has been incorporated into § 300.136, as explained below.

Paragraph (a)(3) has been amended by adding a new paragraph (iv), which states that the definition is not limited to traditional occupational categories.

New paragraphs (b)(3) and (b)(4) have been added, which provide that (1) nothing in this part requires a State to establish a specified training standard (e.g., a masters degree) for personnel who provide special education and related services under Part B of the Act, and (2) a State with only one entry-level academic degree for employment of personnel in a specific profession or discipline, may modify that standard without violating the other requirements of this section.

Comment: Numerous comments were received regarding the role of paraprofessionals and assistants under Part B. Some commenters strongly cautioned against additional regulation since determinations regarding the definitions of paraprofessionals and assistants and the scope of their responsibilities will vary widely from State to State and across disciplines. These commenters also pointed out that Congress chose to provide only minimal guidance in this area. Other commenters made a number of specific suggestions for regulatory changes. Some commenters recommended that the language in paragraph (f) be changed from "may" to "shall" to make it mandatory for States to use paraprofessionals and assistants. Other commenters, who did not support the use of paraprofessionals and assistants to assist in the provision of services under Part B, recommended regulations prohibiting their use.

Many commenters recommended that the regulations clarify that paraprofessionals and assistants who assist in the provision of speech pathology and audiology services under these regulations must be supervised by an individual who meets the highest entry-level academic degree requirement applicable to that profession. Similarly, commenters requested clarification that all paraprofessionals and assistants assisting in the provision of special education and related services under Part B must meet their profession's or discipline's highest entry-level academic degree requirement.

Some commenters recommended that the terms "paraprofessionals" and "assistants" be defined separately, and that the roles and responsibilities and training be set out in the regulations so that all States could have the same definitions, since differences in definitions and responsibilities among States could interfere with the rights of children with disabilities to receive appropriate services under Part B. These commenters also provided suggested definitions to address these concerns.

Commenters also suggested specific language that (1) only those paraprofessionals and assistants who are appropriately trained and supervised are allowed to assist in the provision of services under Part B in accordance with State law, regulations, written policy, and accepted standards of professional practice, and only assist in the provision of services with the consent of their supervisors; (2) paraprofessional and assistant services must be delivered under the direct, ongoing and regular supervision of a qualified professional with competency in the technique(s) employed by the paraprofessional or assistant; (3) paraprofessionals and assistants may not develop, modify, or provide services independent of or without such supervision, and may report findings but not make diagnostic or treatment recommendations to special education decision making teams; (4) the roles, supervision and training of paraprofessionals and assistants must be consistent with the professional standards of the different areas in which they work; (5) paraprofessionals and assistants, at a minimum, must receive organized in-service training under the direct, ongoing and regular supervision of a qualified professional with competency in the technique being employed by the paraprofessional or assistant; and (6) the State must have information on file with the Secretary that demonstrates that the State has laws, regulations, or written policies related to the training, use, and supervision of paraprofessionals and assistants.

Some commenters recommended that § 300.136 be amended to expand services that paraprofessionals and assistants could assist in providing under Part B. Other commenters maintained that the use of paraprofessionals and assistants to assist in the provision of some special education and related services should be prohibited. For example, some commenters recommended that the regulations be clarified to specify that paraprofessionals may not assist in the provision of mental health services, while other commenters recommended clarification indicating that paraprofessionals and assistants could assist in the provision of psychological services, including evaluation and treatment services, only under the supervision of a school psychologist.

Other commenters requested clarification regarding whether paraprofessionals could ever be used in lieu of special education teachers. A few commenters stated that in no case should medical procedures be provided by untrained individuals, and requested clarification to this effect.

A number of commenters recommended that parents must be notified whenever paraprofessionals or assistants are assigned to assist in the provision of services. Other commenters recommended that this type of notice is necessary whenever students with disabilities receive services from an individual who does not meet the highest requirement applicable to their professions, and that parents should have the right to challenge this issue through the IEP process.

Discussion: Section 300.136(f) tracks the statutory requirement in section 612(a)(15)(B)(iii), which permits, but does not require, the use of paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, to assist in the provision of special education and related services under Part B. Since the statute affords a State the option of using paraprofessionals and assistants to assist in the provision of special education and related services to children with disabilities, it would be inappropriate to regulate in a manner that would either require or prohibit the use of paraprofessionals and assistants under Part B.

The statute makes clear that the use of paraprofessionals and assistants who are appropriately trained and supervised must be contingent on State law, regulation, or written policy, giving States the option of determining whether paraprofessionals and assistants can be used to assist in the provision of special education and related services under Part B, and, if so, to what extent their use would be permissible. Therefore, there is no need to provide definitions of the terms "paraprofessionals" and "assistants" in these regulations, since States have the flexibility to determine the scope of their responsibilities.

Section 300.382 of these regulations requires States to include in their CSPD a plan for the inservice and preservice preparation of professionals and paraprofessionals. Appropriate training and supervision are prerequisites for use of paraprofessionals and assistants under Part B, and determinations of what constitutes "appropriate" training and supervision are matters for each State to decide, based on factors relevant to each profession or discipline. Because these regulations do not specify any particular standard for persons providing special education and related services, but instead leave such determinations to States, there also is no need to specify any particular standards for paraprofessionals and assistants or their supervisors in these regulations.

No regulatory changes are necessary regarding information that a State that uses paraprofessionals and assistants to assist in the provision of special education and related services must have on file with the Secretary, since this information already would be part of the personnel standards portion of the State's Part B State plan. If a State chose to adopt a policy regarding the use of paraprofessionals and assistants, the State would be required to submit its policy to the Department only if that policy constitutes a change from the information contained in the State's prior year Part B State submission, under section 612(c) of the Act.

In addition, there is no need to specify whether paraprofessionals and assistants can assist in the provision of psychological services, including mental health services, under these regulations, or to what extent they can participate in the testing process, since State laws, regulations, and written policies, not Part B requirements, would govern these determinations. With respect to "medical services," however, it should be noted that only those medical services that are for diagnostic and evaluation purposes are eligible related services under Part B. Another category of "related services," "school health services," may be provided by a school nurse or other qualified person in accordance with applicable State qualification standards. It is critical that States that use paraprofessionals and assistants do so in a manner that is consistent with the rights of children with disabilities to FAPE under Part B. Since the Act provides that paraprofessionals and assistants may assist in the provision of special education and related services, their use as teachers would be inconsistent with a State's duty to ensure that personnel necessary to carry out the purposes of Part B are appropriately and adequately prepared and trained.

Part B does not require that public agencies give parents information on how paraprofessionals and assistants are assisting in the provision of services to their children. However, public agencies are encouraged to inform parents about whether paraprofessionals are assisting in the provision of special education and related services to their children, including the extent that these individuals are being supervised by appropriately trained and qualified staff.

No clarification has been provided regarding which services are being provided by individuals who do not meet the "highest entry-level requirements" applicable to their profession. The Act's personnel standards provisions and these regulations at § 300.136(c) make it permissible for States to use individuals who do not meet the highest entry-level academic degree requirement applicable to their profession, provided that the State is taking steps to upgrade all personnel in that profession to appropriate professional requirements in the State by a specified date in the future. IDEA allows State the discretion to determine the "specified date" and does not prevent a State from making changes to that date. Thus a State is not prohibited from extending its timeline for retraining or hiring of personnel to meet appropriate professional requirements in the State.

Changes: None.

Comment: A number of comments were received regarding § 300.136(g). These commenters requested definitions of "most qualified individuals available," "good faith efforts," "geographic area," "satisfactory progress," and "shortages of personnel," or the clarification of these terms.

Numerous commenters objected to allowing States that have upgraded all personnel in a specific profession or discipline to appropriate professional requirements in the State to use personnel who did not meet those standards if they were experiencing personnel shortages. These commenters regarded this provision as permitting these States to waive applicable personnel standards. Some of these commenters advocated not allowing States to have a policy that would extend the three-year time frame for individual applicants who are hired under the "waiver provision" to become fully qualified. Other commenters requested clarification to ensure that paragraph (g) not be applied on a system-wide basis but instead be applied to individuals on a case-by-case basis.

Other commenters believed that paragraph (g) and Note 2 must be deleted because under no circumstances should States that have achieved the goal of upgrading all personnel in the State to meet appropriate professional requirements have the option of employing personnel, even temporarily, who do not meet applicable State personnel standards.

Commenters requested specific clarification that a State may exercise the option under paragraph (g) of this section even though the State has reached its established date, under paragraph (c) of this section, for training or hiring all personnel in a specific profession or discipline to meet appropriate professional requirements in the State.

While some commenters recommended that Note 2 either be retained or incorporated into the regulations, many commenters believed that Note 2 should be deleted because it encourages protracted delays in attaining the highest requirement in the State applicable to specific professions or disciplines.

Discussion: Section 300.136(g) of the NPRM incorporates essentially verbatim the new statutory provision at section 612(a)(15)(C) of the Act. Section 300.136(g) affords States the necessary flexibility to serve children with disabilities if instructional needs exceed available personnel who meet appropriate State personnel qualification standards, even though the State has satisfied the requirements of paragraph (c) of this section for personnel in a specific profession or discipline. However, a State's ability to permit its LEAs to utilize this option is conditioned on a number of factors.

Under § 300.136(g), States are given the option of adopting a policy of allowing LEAs in the State, that have made a good faith effort to recruit and hire appropriately and adequately trained personnel, in a geographic area of the State where there is a shortage of personnel that meet applicable State qualification standards, of using the most qualified personnel available who are making satisfactory progress toward completion of applicable course work necessary to meet applicable State qualification standards within a three-year period.

Therefore, in order for § 300.136(g) to be invoked, the State must have made good faith efforts to recruit and hire appropriately and adequately trained personnel. However, before other personnel can be utilized, there must be a shortage of qualified personnel as determined by the State, in a geographic area as defined by the State, to meet instructional needs. The personnel who are utilized under these circumstances also must be making satisfactory progress toward completion of applicable course work within a three-year period.

While a State's decision to invoke the policy under § 300.136(g) depends on a variety of State-specific factors, the statute does not restrict the State's ability to invoke this policy if the conditions in § 300.136(g) are present. However, it is expected that the circumstances in which the policy under paragraph (g) of this section will be invoked will prove to be the exception rather than the rule.

The information provided by commenters does not provide a sufficient basis for restricting to only one three-year period a State's ability to invoke § 300.136(g). Therefore, to avoid confusion, and consistent with the determination explained in Note 2 to this section in the NPRM, the portion of Note 2 that explains that this section can be invoked even if a State has reached its established date for a specific profession or discipline under paragraph (c) of this section should be incorporated into the regulations. Also, the clarification from Note 2 that a State that continues to experience shortages of personnel meeting appropriate professional requirements in the State must address those shortages in its comprehensive system of personnel development should be incorporated into the regulations.

Changes: Paragraph (g) of this section of the NPRM has been designated as paragraph (g)(1) of these regulations. New paragraphs (g)(2) and (g)(3) have been added, and provide that (1) a State that has met its established goal for a specific profession or discipline under paragraph (c) of this section is not prohibited from invoking paragraph (g)(1); and (2) each State must have a mechanism for serving children with disabilities if instructional needs exceed available personnel, and if a State continues to experience shortages of qualified personnel, it must address those shortages in its comprehensive system of personnel development.

Comment: Some commenters requested that clarification be provided to ensure that personnel with disabilities were hired. One comment requested that a new paragraph (h) be added to the regulations to specify that States not utilize standards that "may screen out or tend to screen out individuals with disabilities." Some commenters requested clarification regarding the applicability of the personnel standards provisions to private school staff serving children with disabilities parentally-placed in private schools, and recommended that this be a part of the consultation process.

Other commenters recommended that these regulations require that students who are deaf or hearing impaired receive appropriate instruction in their native language, including sign language, and that sign language interpreters meet particular qualification standards.

Discussion: For the most part, the issues raised by these commenters have been addressed elsewhere in these regulations or through other statutory requirements; therefore, no further clarification has been provided in this section. If State standards screen out individuals with disabilities from providing special education and related services under these regulations, they could violate Federal civil rights laws that prohibit discrimination on the basis of disability.

In addition, as required by Section 427 of the General Education Provisions Act (GEPA), each State must have on file with its Part B application to the Secretary a description of the steps the State is taking to ensure equitable access to, and participation in programs and activities assisted with Part B funds and must have identified the barriers to equitable participation and developed strategies to address those barrier.

The Part B CSPD provisions require each State to develop a plan for the in-service and preservice preparation of professionals and paraprofessionals who work with children with disabilities under these regulations. One of the strategies that must be included in this plan in accordance with § 300.382(h) is how a State will [r]ecruit, prepare, and retain qualified personnel, including personnel with disabilities and personnel from groups that are under-represented in the fields of regular education, special education, and related services."

Therefore, in meeting their obligations under Part B and GEPA, States are required to take steps to ensure equitable access of individuals with disabilities to their programs and must take steps to remove barriers which prevent such access. It is expected that States that determine through their CSPD that they have employed an insufficient number of individuals with disabilities will identify and remove barriers to the employment of individuals with disabilities in the State. This will ensure that qualified individuals with disabilities are recruited and hired to provide special education and related services to children with disabilities under these regulations.

While sign language interpreters must be able to provide appropriate instruction and services to children who are deaf or hearing impaired, no clarification is necessary, since States must establish and maintain standards for all personnel who are providers of special education and related services, including sign language interpreters. See discussion of § 300.23 (qualified personnel) in Subpart A of this Attachment. In addition, section 614(d)(3)(B)(iv) of the Act requires the IEP team to consider the language and communication needs of children who are deaf or hard of hearing. To ensure that this occurs, § 300.136 would require each State to ensure that the necessary personnel are appropriately and adequately prepared and trained.

The personnel standards provisions of these regulations are applicable to persons providing services to children with disabilities who are publicly placed in private schools and to persons providing special education and related services to parentally-placed private school children the LEA, after consultation with representatives of private schools, has chosen to serve.

Changes: None.

Performance Goals and Indicators (§ 300.137)

Comment: Some commenters requested that the regulations be revised to clarify the responsibility of a State to establish performance goals and indicators for children with disabilities if the State has not established performance goals and indicators for general education students. They also requested clarification of States' responsibility to report to the Secretary and the public regarding progress toward achieving the performance goals.

Discussion: Further clarification is not required. As set forth in § 300.137(a), each State is required to demonstrate that it has established performance goals that are "consistent, to the maximum extent appropriate, with other goals standards for all children established by the State." However, regardless of whether a State has established goals for all children, it must establish goals for the performance of children with disabilities, and must establish indicators that the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates (§ 300.137(a) and (b)).

The regulation also specifies that each State report every two years to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under § 300.137(a). The requested revisions are not necessary.

Changes: None.

Comment: Some commenters requested that the regulation be revised to require that, prior to each State's reporting to the Secretary and the public every two years, as required by § 300.137(c), the State conduct widely publicized forums at which students, parents, and concerned citizens can comment on a draft report, and that the State include the comments it receives as part of its final report to the Secretary and the public. Other commenters requested that the regulation be revised to require that each State establish its goals for the performance of children with disabilities with the cooperation and input of parents and children with disabilities, teachers, and members of the community.

Discussion: The Act requires that each State report every two years to the Secretary and the public on the progress of the State and of children with disabilities in the State toward meeting the State's performance goals, but neither requires nor prohibits States from implementing procedures to allow the public the opportunity to comment on draft reports. It is appropriate to leave the use of such procedures to the discretion of the States, and no additional procedures regarding the reports are needed.

In demonstrating eligibility under Part B, States are required to submit information to the Department demonstrating that they meet the requirements of this section of the regulations. Before submitting that information to the Department, the States' proposal will be subjected to public comment and involvement consistent with the public participation provisions of §§ 300.280–300.284. These provisions include public notice and public hearings, and an opportunity for the public to participate before that information is submitted to the Department. The process applies to the initial submission as well as any subsequent substantive provisions.

Changes: None.

Participation in assessments (§ 300.138)

Comment: A number of commenters raised concerns regarding the note following § 300.138, which states that it is assumed that only a small percentage of children with disabilities will need alternative assessments; some commenters requested that the language of the note be incorporated into the regulation itself, while others requested that the note be deleted, and further commenters requested clarification regarding the meaning of 'small percentage' in the note and who would enforce that requirement.

Other commenters asked that the regulation clarify that the IEP team must make the determination that a child will participate in an alternate assessment. Others asked that the regulation be revised to include criteria or guidelines in the regulation for determining if an alternate assessment can be used for a child, while others requested that the regulations require that each State provide such guidance for IEP teams. Some commenters said that the use of the term "alternate assessment" in the regulation and the use of the term "alternative assessment" in the note caused confusion, and asked that "alternate assessment" be defined. Other commenters stated that costs of alternate assessments would be prohibitive. Some commenters expressed concerns regarding the use of accommodations. Some commenters were concerned that the use of accommodations might affect test validity and standardization, while others requested further guidance as to who has the authority to determine whether a particular accommodation is necessary and how that determination must be made. Some of the commenters requested that the regulation specify that accommodations should address students' specific needs and afford maximum independence, while others said that a student's needs should be accommodated by tools or assistive technology that he or she uses on a daily basis or with which he or she is most familiar.

Other commenters asked that a note be added to reaffirm the State's responsibility to ensure that children are provided the accommodations they need so that they can participate in State and district-wide assessments. Some commenters requested clarification as to whether students should participate in assessments according to their performance level or the grade they are in based upon their chronological age. Some commenters requested clarification as to whether participation in alternate assessments was not required until July 1, 2000. A few commenters requested a note to state that assessment practices appropriate for children in grades 4 and older might not be appropriate for younger children.

Discussion: State and district-wide assessment programs are closely aligned with State and local accountability-based reform and restructuring initiatives. Therefore, it is important to allow the flexibility needed for State and local school districts to appropriately include disabled children in State and district-wide assessment programs. Only minimum requirements are included in these regulations for how public agencies provide for the participation of children with disabilities in State and district-wide assessments. The Department will be working with State and local education personnel, parents, experts in the field of assessment and others interested in the area of assessment to identify best practice that could serve as the basis for a technical assistance document. As provided in § 300.347(a)(5), the IEP team must determine whether a child with a disability will participate in a particular State or district-wide assessment of student achievement, and if the child will not, the IEP must include a statement of why that assessment is not appropriate for the child and how the child will be assessed. If IEP teams properly make individualized decisions about the participation of each child with a disability in general State or district-wide assessments, including the use of appropriate accommodations, and modifications in administration (including individual modifications, as appropriate), it should be necessary to use alternate assessments for a relatively small percentage of children with disabilities. Consistent with the decision to not include notes in these final regulations, the note is deleted.

Section 300.138 requires the State or LEAs, as appropriate, to develop alternate assessments and guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs. Alternate assessments need to be aligned with the general curriculum standards set for all students and should not be assumed appropriate only for those student with significant cognitive impairments.

Section 300.347(a)(5) requires that the IEP team have the responsibility and the authority to determine what, if any, individual modifications in the administration of State or district-wide assessments are needed in order for a particular child with a disability to participate in the assessment. Section 300.138(a) should be revised to reflect the requirement that modifications in administration of State or district-wide assessments must be provided if necessary to ensure the participation of children with disabilities in those assessments. As part of each State's general supervision responsibility under § 300.600, it must ensure the appropriate use of modifications in the administration of State and district-wide assessments.

Test validity is an important variable and the Department has invested discretionary funds in providing assistance to States regarding appropriate modifications. The determination of what level of an assessment is appropriate for a particular child is to be made by the IEP team. It should be noted, however, that out of level testing will be considered a modified administration of a test rather than an alternative test and as such should be reported as performance at the grade level at which the child is placed unless such reporting would be statistically inappropriate.

Although SEAs and LEAs are not required by § 300.138 to conduct alternate assessments until July 1, 2000, each SEA and LEA is required to ensure, beginning July 1, 1998, that, if a child will not participate in the general assessment, his or her IEP documents how the child will be assessed.

Changes: Paragraph (a) has been revised to acknowledge that, for some children with disabilities, participation in State and district-wide assessments may require appropriate modifications in administration of the assessments as well as appropriate accommodations. The note has been removed.

Reports Relating to Assessments (§ 300.139)

Comment: Several commenters noted that the requirement in § 300.139(b)(1) that each State's reports to the public include "aggregated data that include the performance of children with disabilities together with all other children" exceeds the requirements of the Act at section 612(a)(17)(B), and should be deleted from the regulations. Other commenters requested clarification as to whether States are required to aggregate data regarding children who take alternate assessments with results for students who take the general assessment. Other commenters requested that the regulations require or suggest that States disaggregate assessment results by disability category in reporting results to the public. A few commenters requested that "public agency" be replaced with "SEA" in the note following § 300.139.

Discussion: In order to ensure that students with disabilities are fully included in the accountability benefits of State and district-wide assessments, it is important that the State include results for children with disabilities whenever the State reports results for other children. When a State reports data about State or district-wide assessments at the district or school level for nondisabled children, it also must do the same for children with disabilities. Section 300.139 requires that each State aggregate the results of children who participate in alternate assessments with results for children who participate in the general assessment, unless it would be inappropriate to aggregate such scores.

Section 300.139 and the Act neither require nor prohibit States from disaggregating assessment results by disability category in reporting results to the public; this is a matter that should be left to the discretion of each State. The text of § 300.139 tracks the statute, which addresses reporting requirements of the SEA.

The proposed note clarified that § 300.139(b) requires a public agency to report aggregated data that include children with disabilities, but that a public agency is not precluded from also analyzing and reporting data in other ways (such as, maintaining a trendline that was established prior to including children with disabilities in those assessments).

Changes: Consistent with the decision to not include notes in the final regulations, the note following § 300.139 of the NPRM has been removed.

Methods of ensuring services (§ 300.142)

Comment: Commenters emphasized that a child's right to FAPE should not be adversely affected because the child is eligible for services under Title XIX of the Social Security Act (Medicaid). For example, commenters recommended adding clarification prohibiting a State Medicaid agency or a Medicaid managed care organization from refusing to pay for or provide a service for which it would otherwise be responsible under Medicaid because the service is part of FAPE for a child.

Some commenters recommended that § 300.142(a)(4) be amended to incorporate Senate language about use of Medicaid funds to finance the cost of services provided in a school setting in accordance with a child's IEP to ensure that Medicaid-funded services are provided in the LRE and not in accordance with a medical model. However, some commenters were concerned that Medicaid funding would only be available for services for children with disabilities in school settings and that reimbursement for services for children in other settings, such as the home, in accordance with their IEPs, would be denied.

Although many commenters acknowledged that Medicaid has been an effective funding source for services in children's IEPs, clarification was requested to ensure that there was not a delay in or denial of services or alteration in types of services provided to children with disabilities under these regulations, based on the rules of some other provider or contractor.

Many commenters noted that some LEAs will delay initiating a service until Medicaid payments are made, and requested that § 300.142(d) be amended to specify (1) a timeline to ensure that services are not delayed until payment is received from another agency; (2) a requirement that the LEA must provide the service and seek reimbursement from the entity that is ultimately found to be financially responsible; (3) a timeline for entering into interagency agreements; and (4) a timeline for the prompt provision of noneducational services specified in a child's IEP. Some commenters recommended that clarification be provided to specify that State interagency agreements are binding on contractors and managed care organizations.

Other commenters recommended a specific enforcement mechanism to make State IDEA grants contingent upon the existence and effective operation of an interagency agreement that complies with IDEA. Alternatively, the commenters' recommendation was that the regulations be amended to provide a mechanism for school districts to seek legal redress through the Department of Education or the judiciary against any State agency which fails to act in accordance with an existing legally-appropriate interagency agreement.

While many commenters found the explanation in Note 1 to this section of the NPRM useful in understanding the intent of these requirements and therefore recommended that the note either be retained or incorporated into the regulation, other commenters recommended that Note 1 be removed because it exceeded the statute.

Discussion: While the concerns expressed by these commenters are very significant, most of them either already are addressed in this section or elsewhere in these regulations. However, in light of the general decision to remove notes from these final regulations, Note 1 should be removed as a note, but pertinent portions are incorporated in this discussion. Regarding the concern that a child's entitlement to FAPE not be construed as relieving a Medicaid provider or other public insurer of its responsibility to pay for required services under these regulations, § 300.601 implements the statutory provision at section 612(e) of the Act, which provides that Part B does not permit a State to reduce medical or other assistance or to alter eligibility under Titles V and XIX of the Social Security Act with respect to the provision of FAPE for children with disabilities in the State. Section 612(a)(12) of the Act, which is implemented by § 300.142, reinforces this important principle. This new statutory provision emphasizes the obligation for interagency coordination between educational and noneducational public agencies to ensure that all services necessary to ensure FAPE are provided to children with disabilities, and that the financial responsibility of the State Medicaid agency or other public insurer shall precede that of the LEA or State agency responsible for developing the child's IEP.

However, there is nothing in this provision that alters who is eligible for, or covered services under Medicaid or other public insurance programs. Therefore, the regulations should make clear that the coverage of or service requirements for Title XIX or Title XXI of the Social Security Act as defined in Federal statute, regulation or policy or the coverage of or service requirements for any other public insurance program are not affected by the IDEA regulation.

With regard to the concern that services paid for with Medicaid funds must be provided in the LRE, and, if appropriate, at home, payment for services cannot be conditioned solely on the setting in which necessary services are provided. Regardless of whether services are paid for with Part B or with Medicaid funds, all special educational services for children with disabilities under Part B must be individually-determined and provided in the least restrictive setting in which the disabled child's IEP can be implemented.

In response to the suggestions of commenters, the concept explained in the Senate and House Committee Reports on Pub. L. 105–17 which had been incorporated into Note 1 to this section of the NPRM, should be added to paragraph (b)(1) of these regulations to emphasize that health services provided to children with disabilities who are Medicaid-eligible and meet the standards applicable to Medicaid, may not be disqualified from Medicaid reimbursement because they are services provided in a school context in accordance with a child's IEP. However, if a public agency is billing a State Medicaid agency or other public insurance program for services provided under this part, the public agency must ensure that the services and the personnel providing those services meet applicable requirements under statute, regulation or policy applying to that other program.

Similarly, if the IEP team determines that a child needs to receive a particular service at home in order to receive FAPE, that service would not be disqualified from Medicaid reimbursement under the terms of these regulations, and States must address such concerns in the context of their interagency agreements under the terms of paragraph (a) of this section.

In response to numerous comments requesting clarification on the issue of timely delivery of services paid for by noneducational public agencies, it is particularly important to ensure that there are no undue delays in the provision of required services due to the failure of a noneducational public agency to reimburse the educational public agency for required services for which the noneducational public agency is responsible. Such delays could effectively nullify the requirements for interagency coordination in section 612(a)(12) of the Act.

Although paragraph (a)(4) of this section already includes a requirement that agencies have procedures that promote the coordination, timely, and appropriate delivery of services under these regulations, in response to concerns of commenters, the concept from the language in the Senate and House Committee Reports on Pub. L. 105–17, which is restated in Note 1 to this section of the NPRM, is important to clarify understanding of these final regulations. Paragraph (b)(2) of this section should be revised to clarify that the provision of services under this section must be provided in a timely manner.

No specific timelines have been included in these regulations. However, States are required to take the necessary steps to enter into appropriate interagency agreements between educational and noneducational public agencies, including ensuring the prompt resolution of interagency disputes. Effective interagency coordination should facilitate the timely delivery of special educational services as well as minimize any undue delays in the delivery of such services financed by noneducational public agencies.

Despite suggestions of commenters, no provision has been added regarding the responsibilities of contractors, since the noneducational public agency, not the contractor, is the party to the agreement.

No enforcement mechanism has been specified in these regulations. Under paragraph (a) of this section, the SEA must develop a mechanism for resolving disputes between respective agencies regarding financial responsibility for required services, and must ensure that all services needed to ensure the provision of FAPE are provided, including during the pendency of any interagency dispute.

Because a mechanism for interagency coordination is a condition of eligibility for assistance under Part B, a State that fails to develop an effective mechanism for resolving interagency disputes and ensuring the provision of required services during the pendency of such disputes could jeopardize its continued eligibility for IDEA funding.

Further, under section 613(a)(1) of the Act, in order for an LEA to be eligible for Part B funds from the State for any fiscal year, the LEA must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 612 of the Act. This would include the requirement in section 612(a)(12) relating to methods of ensuring services.

Changes: Section 300.142 has been amended by adding language to paragraph (b)(1) to specify that a noneducational public agency may not disqualify an eligible service for Medicaid reimbursement because that service is provided in an educational context. Paragraph (b)(2) has been amended to indicate that services must be provided in a timely manner, by the LEA (or State agency responsible for developing the child's IEP). Note 1 to this section of the NPRM has been removed. A new paragraph (i) has been added to this section to clarify that nothing in this part should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public insurance program under Federal statute, regulations or policy for Title XIX or

Title XXI of the Social Security Act, or any other public insurance program.

Comment: Commenters recommended that a statement be added to § 300.142(a)(4) to specify that services financed as a result of interagency coordination are to supplement, not supplant, services provided by the LEA. Other commenters asked that § 300.142(a)(4) be amended to specify that school-employed personnel must be the first resource for providing related services. In addition, commenters also recommended that clarification be added to specify that the use of contract personnel or other arrangements should not supersede or supplant the use of school based personnel, with very limited exceptions.

Discussion: The requirement in section 612(a)(12)(A) of the Act, also reflected in paragraph (a)(1) of this section (which specifies that the financial responsibility of the State Medicaid agency or other public insurer of children with disabilities must precede that of the LEA or State agency responsible for the provision of FAPE) should not be construed to mean that Medicaid-funded services are supplemental to the basic services provided under these regulations. Regardless of the source of payment, the public agency responsible for educating the disabled child still must ensure that the child receives all required services at no cost to the parents. Therefore, if Medicaid funds only a portion of required services based on service caps, the public agency responsible for the provision of FAPE must ensure that any remaining necessary services are provided at no cost to the parents. However, a public agency may not make decisions regarding the provision of required services to children with disabilities under these regulations based solely on availability of Medicaid funding. To the contrary, if a public agency determines that particular services are necessary to ensure the provision of FAPE to children with disabilities, those services must be provided at no cost to the parents, regardless of whether Medicaid funds the service.

No clarification has been provided regarding selection of personnel to provide required services under these regulations. In ensuring the provision of FAPE, public agencies may use any personnel that meet applicable State standards in accordance with §§ 300.136 and 300.23 of these regulations. However, as noted above, if a public insurance program is billed for services provided under this part, those services must meet the requirements of that program, including personnel standards that apply to that program, in addition to conforming with the requirements of this part. Once determinations about personnel qualifications have been made, Part B does not govern the manner in which necessary personnel are selected to meet instructional needs under these regulations.

Changes: None.

Comment: Commenters recommended clarification to specify that all services must be free from direct and indirect costs to parents. A principal concern of commenters was that even in circumstances where it is highly probable that future financial costs will result, parents feel constrained to permit public agencies to access their insurance because of the fear of losing necessary services for their disabled children.

Many commenters believe that there is always a cost associated with using private insurance, i.e., exhaustion of lifetime caps, decreased benefits, increased co-pays and costs, risk of future uninsurability with another insurance carrier, and possible termination of health insurance. These commenters recommended that a new paragraph be added to this section, which would require public agencies to inform parents that voluntary use of their private insurance could entail these risks, that parents have no obligation to permit access to their insurance payments, and have the right to say no. These commenters also recommended that Note 2 to this section of the NPRM be deleted.

Some commenters also objected that § 300.142(e) does not support the concept of obtaining parental permission for use of public insurance, and recommended that the regulation specify that parents must give informed consent to use of their public or private insurance which (1) must be voluntary on the part of parents, (2) renewed at least annually, (3) can be revoked at any time, and (4) must include a written description of "potential financial costs" associated with using their insurance. Other commenters agreed with proposed paragraph (e)(1) and Note 2 and urged that they be retained in the final regulations.

Discussion: Proposed paragraph (e)(1) of this section of the NPRM incorporated the interpretation of the requirements of Part B and Section 504 contained in the Notice of Interpretation (Notice) on use of parents' insurance proceeds, published on December 30, 1980 (45 FR 86390). Under the interpretation in the Notice, public agencies may not access private insurance if parents would incur a financial cost, and use of parent's insurance proceeds, if parents would incur a financial cost, must be voluntary on the part of the parent.

In light of the concerns of numerous commenters that the use of private insurance always involves a current or future financial cost to the parents, and the Department's experience in administering Part B, the regulations regarding use of private insurance should be revised. As numerous commenters have indicated, parents who permit use of their private insurance often experience unanticipated financial consequences. These parents often act without full knowledge of the future impact of their decision. Public agencies should be permitted to access a parent's private insurance proceeds only if the parent provides informed consent to use.

Consistent with the definition of "consent" in these regulations, such consent must fully inform parents that they could incur financial consequences from the use of their private insurance to pay for services that the school district is required to provide under the IDEA, such as surpassing a cap on benefits, which could leave them uninsured for subsequent services, and that the parents should check with their private insurance provider so that they understand the foreseeable future financial costs to themselves before they give consent. This consent should be obtained each time a public agency attempts to access private insurance, and be voluntary on the part of the parents.

In addition, parents need to be informed that their refusal to permit a public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. However, the suggestion of commenters that parents be informed that they have the right to refuse use of their private insurance because of future risks of financial consequences has not been adopted because it is unnecessary, in light of the new requirement that public agencies obtain parental consent to use a parent's private insurance.

Changes: A new paragraph (f) has been added to clarify the circumstances under which public agencies may access parent's private insurance to pay for required services under these regulations. Note 2 to this section of the NPRM has been removed.

Comment: The majority of commenters urged regulations on the use of public insurance that would parallel those governing use of private insurance. Commenters recommended that regulations clarify that the same protections available to parents when public agencies access private insurance are available to parents when public agencies access public insurance. These commenters also disagreed with the statement on page 55036 of the preamble to the NPRM that suggested that regulation on this issue was not necessary because there is no financial loss to parents under current public assistance programs such as Medicaid.

Examples of financial costs cited by commenters resulting from Medicaid use were (1) limitation or decrease in public insurance benefits available to children with disabilities and their families for non-school needs; (2) a requirement that private insurance initially be used before Medicaid funds are made available; (3) limitations on amounts of services that can be reimbursed with Medicaid funds; and (4) premiums or co-pays resulting from use of Medicaid funding.

Commenters also requested that the definition of "financial cost" be expanded to include costs such as a risk of losing eligibility for home and community-based waivers based upon aggregate health-related expenditure, and costs associated with Medicaid buy-ins. These commenters also recommended that the regulations clarify that parental consent must be obtained before a public agency can access Medicaid or other public insurance benefits available to the parent.

Some commenters urged the elimination of definitions or terms not included in the statute, such as the definition of financial cost. Other commenters recommended that changes not be made and agreed with the statement in the preamble to the NPRM that there is no financial cost to parents who access Medicaid or other public insurance benefits. These commenters believed that the regulation should state that parental permission need not be obtained before accessing public insurance. Some of these commenters also recommended further observation and study of current State practices to ensure that the regulations do not have an adverse impact on currently existing and effective financial systems. These commenters also recommended additional guidance to allow States maximum flexibility to utilize all available resources.

Some commenters recommended that Note 3 be retained as a note or that pertinent portions be incorporated into the regulation, while others requested that Note 3 be deleted.

Discussion: As numerous commenters pointed out, the statutory basis of the 1980 Notice of Interpretation governing use of private insurance proceeds also applies to children with disabilities who have public insurance. In both instances services under Part B must be at no cost to parents. In view of the comments received, it appears that the statement contained on page 55036 of the preamble to the NPRM, which indicates that there is no risk of financial cost to parents if public agencies use Medicaid or other Federal, State or local public insurance programs, is not entirely accurate.

While it is essential that public agencies have the ability to access all available public sources of support to pay for required services under these regulations, services must be provided at no cost to parents. However, in the majority of cases, use of Federal, State or local public insurance programs by a public educational agency to provide or pay for a service to a child will not result in a current or foreseeable future cost to the family or child. For example, under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) program of Medicaid, potentially available benefits are only limited based on what the Medicaid agency determines to be medically necessary for the child and are not otherwise limited or capped. Currently, approximately 90 percent of the school-aged children who are eligible for public insurance programs are eligible for services under the EPSDT program. Where there is no cost to the family or the child, public educational agencies are encouraged to use the public insurance benefits to the extent possible. It also should be noted that a public educational agency is required to provide a service that is needed by a child and has been included on his or her IEP but that is not considered medically necessary under EPSDT or other public insurance program. As is the case for any other service required by a child's IEP, if a service on a child's IEP is provided by a public insurance program at a site that is separate from the child's school, the public educational agency is responsible for ensuring that the transportation is at no cost to the child or family.

There are some situations, however, that should be addressed by the regulation to ensure that use of public insurance does not result to a cost to the child or family. In some public insurance programs, families are required to pay premiums or co-pay amounts in order to be covered by or use the public insurance. Parents of children with disabilities under Part B should not be required to assume those costs so that a school district can use the child's public insurance to cover services required under Part B. While these regulations do not affect the requirement under Medicaid that the State Medicaid agency pursue liable third party payers such as private insurance providers, for the reportedly relatively small number of children and families who are covered by both private and public insurance, under IDEA parents may not be required to assume costs incurred through use of private insurance so that the school can get reimbursement from the public insurer for services in the child's IEP. Under IDEA, if a Medicaid-enrolled child also is covered by private insurance, the public agency must choose one of two options—either obtain the parent's consent to use the private insurance, or not use Medicaid to provide the service. One way a public agency might be able to obtain that consent would be to offer to cover the costs that would normally, under Medicaid, be assessed against the private insurer. Similarly, if under Medicaid a parent or family normally would incur an out-of-pocket expense such as a co-pay or deductible, a public agency may not require parents to incur that cost in order for their child to receive services required under the IDEA. In such a case, again, the public agency must choose one of two options—either cover the out-of-pocket expense so that the parent does not incur a cost, or not use Medicaid to provide the service. The regulations should make clear that a public agency is able to use Part B funds to pay the cost that under Medicaid requirements would otherwise be covered by a third party payer.

Public insurance limits of the amounts of services that will be covered based on the public insurer's determination of what is medically necessary for the child are not prohibited by Part B. However, a public educational agency's use of a child's benefits under a public insurance program should not result in the family having to pay for services that are required for the child outside of the school day and that could be covered by the public insurance program. For example, if a public insurer were to determine that eight hours of nursing services were medically necessary for a child whose medical devices needed constant trained supervision, a school district's use of six of those hours during the school day would mean that family would have to assume the financial responsibility for those services throughout the night. In such a case, the family would be incurring a cost due to the school district's use of the public insurance benefit. Risk of loss of eligibility for home and community-based waivers, based in aggregate health-related expenditures could also constitute a cost to a family for those few children with very extensive health related needs.

A public agency may not require a parent to sign up for Medicaid or other public insurance benefits as a condition for the child's receipt of FAPE under Part B. A child's entitlement to FAPE under Part B exists whether or not a parent refuses to consent to the use of their Medicaid or public insurance benefits or is unwilling to sign up for Medicaid or other public insurance benefits. Children with disabilities are entitled to services under Part B, regardless of parents' personal choices to access Medicaid or other public insurance benefits.

Although section 612(a)(12) of the Act makes clear States' obligations to ensure that available public sources of support precede responsibilities of public agencies under these regulations, Medicaid or other public insurance benefits cannot be considered available public sources of support when parents decline to access those public benefits. However, there is nothing in these regulations that would prohibit a public agency from requesting that a parent sign up for Medicaid or other public insurance benefits. Furthermore, a public agency would not be precluded from using a child's public insurance, even if parents incur a financial cost, so long as the public agency's use of a child's public insurance is voluntary on the part of the parent.

In order to ensure that children with disabilities are afforded a free appropriate public education at no cost to their parents, the regulation should be amended to address children with disabilities who are covered by public insurance by specifying that a public agency may use Medicaid or other public insurance benefits programs in which a child participates with certain exceptions. Those exceptions would be that a public agency may not require parents to sign up for public insurance in order for their child to receive FAPE under Part B of the Act; require parents to incur out-of-pocket expenses related to filing a public insurance claim for Part B services; and may not use the public insurance if the use would decrease coverage or benefits, increase premiums, lead to discontinuation of insurance, result in the family paying for services that otherwise would be covered by the public insurance and that are required by the child outside of the time the child is in school, or risk loss of eligibility for home and community-based waivers. However, unlike the rule related to private insurance, Part B would not require the public agency to obtain parent consent each time it uses the public insurance. Under the terms of the public insurance program, consent may be required before a public educational agency may use a child or family's public insurance benefits.

In light of the importance of the issues addressed in Note 3 to this section of the NPRM, Note 3 should be removed as a note, and a new paragraph (g), regarding use of Part B funds, should be added to this regulation. This paragraph would permit use of Part B funds for (1) the cost of those required services under these regulations, if parents refuse consent to use public or private insurance; and (2) the costs of accessing parent's insurance, such as paying deductible or co-pay amounts.

Changes: Paragraph (e) has been amended to address circumstances under which a public agency can access a parent's Medicaid or other public insurance benefits to pay for required services under these regulations. The definition of financial costs in the NPRM has been deleted. Note 3 to this section of the NPRM has been removed, and the substance of Note 3 has been incorporated into a new paragraph (g) of this section.

Comment: Several commenters were concerned that § 300.142(f) of the NPRM makes it permissible for public agencies not to use funds reimbursed from another agency to provide special education and related services to children with disabilities. Suggestions made by commenters were that this paragraph either be deleted or changed to require that these reimbursed funds must be used in this program.

Commenters recommended that Note 4 be deleted since it gives public agencies the option of dedicating these funds to the Part B program only if they choose to do so. These commenters believe that this change is necessary for this regulation to be consistent with the purpose of section 612(a)(12) of the Act, which places financial responsibility for the provision of special education and related services on agencies other than schools. Other commenters recommended that Note 4 be deleted because it is redundant of § 300.3, which provides that the regulations in 34 CFR part 80 apply to this program.

Discussion: In response to concerns of commenters, Note 4 should be removed, but pertinent portions of Note 4 should be incorporated into the text of the final regulations. This section should clarify that, if a public agency receives funds from public or private insurance for services under these regulations, the public agency is not required to return those funds to the Department or to dedicate those funds for use in the Part B program, which is how program income must be used, although a public agency retains the option of using those funds in this program if it chooses to do so. Reimbursements are similar to refunds, credits, and discounts which are specifically excluded from program income in 34 CFR 80.25(a).

In addition, the regulations should clarify that funds expended by a public agency from reimbursements of Federal funds will not be considered State or local funds for purposes of §§ 300.154 and 300.231. If Federal reimbursements were considered State and local funds for purposes of the maintenance of effort provisions in §§ 300.154 and 300.231 of these regulations, SEAs and LEAs would experience an artificial increase in their base year amounts and would then be required to maintain a higher, overstated level of fiscal effort in the succeeding fiscal year.

Changes: Section 300.142(f) has been redesignated as § 300.142(h) and revised to clarify that (1) A public agency that receives proceeds from public or private insurance for services under these regulations is not required to return those funds to the Department or to dedicate those funds to this program because they will not be treated as program income under 34 CFR 80.25; and (2) funds expended by a public agency from reimbursements of Federal funds will not be considered State or local funds for purposes of §§ 300.154 and 300.231 of these regulations. Note 4 to this section of the NPRM has been removed.

Recovery of Funds for Misclassified Children (§ 300.145)

Comment: Some commenters requested that the regulation be revised to provide a State the opportunity for a hearing before a student is declared ineligible for Part B funding.

Discussion: Section 300.145 requires that each State have on file with the Secretary policies and procedures that ensure that the State seeks to recover any funds it provided to a public agency under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act. There is no need to revise the regulation to provide for administrative review of a decision by this Department that Part B funds should be recovered from a State because of an erroneous child count. The Department uses the administrative appeal procedures set out at 34 CFR Part 81 in recovering funds because of an erroneous child count for cases where the Department is attempting to recover grant funds, including Part B funds.

Changes: None.

Suspension and Expulsion Rates (§ 300.146)

Comment: Some commenters requested the regulation be revised to permit States to use sampling procedures to obtain the data that they will examine pursuant to § 300.146(a).

Discussion: Obtaining complete and accurate data on suspension and expulsion is too critical to be collected on a sampling basis.

Changes: None.

Comment: Some commenters requested that § 300.146(b) be revised to require that a State review and if appropriate revise its comprehensive system of personnel development, if the State finds that significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs.

Discussion: Section 300.146(b) requires that, if an SEA finds that significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs, the SEA must, if appropriate, revise (or require the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

Among the policies that a State would review and if necessary revise are its CSPD policies and procedures related to ensuring that personnel are adequately prepared to meet their responsibilities under the Act. Further, § 300.382 specifically requires each State to develop strategies to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the needs of children with disabilities; and these strategies must include how the State will "* * * enhance the ability of teachers and others to use strategies, such as behavioral interventions, to address the conduct of children with disabilities that impedes the learning of children with disabilities and others" (§ 300.382(f)). Further guidance is not needed.

Changes: None.

Public Participation (§ 300.148)

Comment: None.

Discussion: Section 300.148 requires each State to ensure that, prior to the adoption of any policies and procedures needed to comply with this part, there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities consistent with §§ 300.280–300.284.

In the past, a number of States have indicated that certain State special education policies that are also required under this part had previously been subjected to public review and comment under the State's own public participation process, and the States have expressed concern about having to repeat the process for those policies under §§ 300.280–300.284.

The need for an effective public participation process is critical to the adoption and implementation of policies and procedures that comply with the requirements under this part. However, if a State, in adopting State special education policies had previously submitted those policies through a public participation process that is comparable to and consistent with the requirements of §§ 300.280–300.284, it would be unnecessary and burdensome to require the State to repeat the process.

Therefore, a provision would be added to § 300.148 to clarify that a State will be considered to be in compliance with this provision if the State has subjected the policy or procedure to a public review and comment process that is required by the State for other purposes and that State public participation process with respect to factors such as the number of public hearings, content of the notice of hearings, and length of the comment period, is comparable to and consistent with the requirements of §§ 300.280–300.284.

Changes: Section 300.148 has been amended to include the provision described in the above discussion.

Prohibition Against Commingling (§ 300.152)

Comment: None.

Discussion: The proposed note clarified that the assurance required by § 300.152 is satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of the Part B funds and that separate bank accounts are not required, and referred the reader to 34 CFR § 76.702 in EDGAR, regarding Fiscal control and fund accounting procedures. Because this information provides useful guidance to States, it should be incorporated into the regulations.

Changes: The substance of the note is incorporated into the text of the regulation.

Maintenance of State Financial Support (§ 300.154)

Comment: None.

Discussion: States should be able to demonstrate that they have not reduced the amount of State financial support for special education and related services for children with disabilities, whether made directly available for those services or otherwise made available in recognition of the excess costs of educating children with disabilities on either a total or per child basis. A number of States, for example, have State funding formulas that are based on enrollment which could result in a decrease in the total amount of State financial support if enrollment declines.

Changes: Paragraph (a) of this section has been revised to clarify that either a total or per child level of State financial support is acceptable.

Annual Description of Use of Part B Funds (§ 300.156)

Comment: Some commenters requested that the regulation be made consistent with the statutory provision at section 611(f)(5) of the Act by deleting § 300.156(b).

Discussion: It is reasonable and appropriate to permit a State, if the information which it would submit pursuant to § 300.156(a) for a given fiscal year is the same as the information that it submitted for the prior fiscal year, to submit a letter to that effect rather than resubmitting information that it has previously submitted.

Changes: None.

Excess Cost Requirement (§ 300.184)

Comment: Some commenters asked that the regulation be revised to require regular financial audits to ensure compliance with the excess cost requirements.

Discussion: Each SEA, as part of its general supervision responsibility under § 300.600, must ensure that LEAs comply with all requirements of Part B, including the requirements of § 300.184 regarding excess cost. Each SEA may meet this requirement through a variety of methods, including monitoring and financial audits.

Changes: None.

Meeting the Excess Cost Requirement (§ 300.185)

Comment: None.

Discussion: The proposed note clarified the Department's longstanding position that: (1) The excess cost requirement means that the LEA must spend a certain minimum amount for the education of its children with disabilities before Part B funds are used, ensuring that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district in elementary or secondary school as the case may be; (2) excess costs are those costs of special education and related services that exceed the minimum amount; (3) if an LEA can show that it has (on the average) spent the minimum amount for the education of each of its children with disabilities, it has met the excess cost requirement, and all additional costs are excess costs; and (4) Part B funds can then be used to pay for these additional costs. However, several commenters requested that the substance of all Notes be incorporated into the text of the regulations or the Notes deleted.

Changes: The note has been deleted.

Requirements for Establishing Eligibility (§ 300.192)

Comment: Section 300.192(c) requires that, "Notwithstanding any other provision of §§ 300.190–300.192, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by § 300.130." Some commenters requested that the regulation be revised to emphasize the appropriateness of children's educational programs as strongly as placement in the least restrictive environment.

Discussion: Section 300.192(c) clarifies that notwithstanding whether an LEA establishes Part B eligibility as a single LEA or jointly with other LEAs, it must ensure compliance with the LRE requirements of the Act. This provision does not in any way diminish an LEA's responsibility to ensure that FAPE is made available to all eligible children with disabilities.

Changes: None.

LEA and State Agency Compliance (§ 300.197)

Comment: Some commenters requested that the regulations be revised to require that each SEA conduct sufficient monitoring activities in each LEA and State agency, at least once every three years, to enable the SEA to make findings regarding the extent to which the agency is in compliance. Other commenters requested that § 300.197(a) be revised to reduce or cease to provide further payments under Part B to an LEA or State agency if SEA finds that the agency is engaging in a pattern of noncompliance or has failed promptly to remedy any individual instance of noncompliance.

Section 300.197(c) requires that an SEA consider any decision resulting from a hearing under §§ 300.507–300.528 that is adverse to the LEA or State agency involved in the decision in carrying out its functions under § 300.197. Some commenters requested that the regulation be revised to require that the SEA also consider adverse decisions on complaints filed under §§ 300.660–300.662.

Discussion: Each SEA, as part of its general supervision responsibility under § 300.600, must ensure that all public agencies meet the educational standards of the SEA, including the requirements of Part B; and the General Education Provisions Act requires that each SEA use effective monitoring methods to identify and correct noncompliance with Part B requirements. In implementing this requirement, each SEA must determine: (1) the frequency with which it must monitor each of the public agencies in the State in order to ensure compliance; and (2) whether a single act or pattern of noncompliance demonstrates substantial noncompliance necessitating the SEA to pursue financial sanctions.

Unlike hearings that are resolved by impartial due process hearing officers who are not SEA employees, all complaints under the State complaint procedures alleging a violation of Part B are resolved directly by the SEA, which must also ensure correction of any violations it identifies in response to such complaints. Therefore, the SEA will, as part of its general supervision responsibilities, consider any adverse complaint decisions in meeting its responsibilities under § 300.197, and the requested revision is not necessary.

Changes: None.

Maintenance of Effort (§ 300.231)

Comment: Some commenters expressed concern that the provision on local maintenance of effort (MOE) would mean that even in years when State legislatures increased State appropriations to offset financial expenditures of LEAs, those funds could not be included in making determinations as to whether the maintenance of effort provision had been met.

Discussion: The statutory LEA-level maintenance of effort provision requires that LEAs do not use the funds they are awarded under the IDEA to reduce the level of expenditures that they make from local funds below the level of those expenditures for the preceding year (except as provided in §§ 300.232 and 300.233). The statutory provision replaces a prior regulatory provision that had required LEAs to maintain the same total or per capita expenditures from State and local funds as in prior years, which was viewed as financially burdensome by LEAs when they were required, because of this prior regulatory provision, to replace out of local funds any amount by which a State reduced the amount of State funds going to an LEA.

Therefore, in recognition of this change, the regulation would allow a comparison of local funding in the grant year to local funding in a prior year. If a State assumes more responsibility for funding these services, such as when a State increases the State share of funding for special education to reduce the fiscal burden on local government, an LEA may not need to continue to put the same amount of local funds toward expenditures for special education and related services in order to demonstrate that it is not using IDEA funds to replace prior expenditures from local funds.

On the other hand, an LEA should not be able to replace local funds with State funds when the combination of local and State funding is not at least equal to a base amount from the same sources, as this would result in reductions in expenditures not contemplated by the statute. Since those Federal funds for which accountability is not required to a Federal or State agency are expended at the discretion of an LEA, they may be included in computations of local funds budgeted and expended for special education and related services for children with disabilities.

In determining whether an LEA could receive a subgrant in any year, an SEA should compare the amount of funds from appropriate sources budgeted for the grant year to the amount actually expended from those sources in the most recent fiscal year for which data are available. Reductions in the amount budgeted would be permissible for the conditions described in §§ 300.232 and 300.233, if applicable. An LEA that did not expend in a grant year from those sources at least as much as it had in the year on which the maintenance of effort comparison for that year is based, would be liable in an audit for repayment of the amount by which it failed to expend to equal the prior year's expenditures, up to the total amount of the LEA's grant.

Changes: A new paragraph has been added to clarify the maintenance of effort provision.

Exception to Maintenance of effort (§ 300.232)

Comment: Some commenters requested that the regulation be revised to specifically require that lower-salaried staff who replace special education and related services personnel, who depart voluntarily or for just cause, meet entry-level academic degree requirements that are based on the highest requirements in the State for the relevant profession or discipline. Other commenters requested retention of the provision in § 300.233(a) that an LEA may reduce its expenditures from one year to the next if the reduction is attributable to the voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel, but that the language specifying that these personnel must be replaced by qualified, lower-salaried staff and the note following this regulation be deleted.

Discussion: The requirements of § 300.136 regarding personnel standards apply to personnel who replace special education and related services personnel, who depart voluntarily or for just cause. It is important to make clear in the regulation that all staff providing special education and related services must be qualified.

The Senate and House committee reports on Pub. L. 105-17, with respect to the voluntary departure of special education personnel described in § 300.232(a), clarify that the intended focus of this exception is on special education personnel who are paid at or near the top of the salary schedule, and sets out guidelines under which this exception may be invoked by an LEA. These guidelines (which provide that the agency must ensure that such voluntary retirement or resignation and replacement are in full conformity with existing school board policies in the agency, with the applicable collective bargaining agreement in effect at that time, and with applicable State statutes) are important in the implementation of this section and, therefore, should be added to the regulation. (S. Rep. No. 105-17, p. 16, H. R. Rep. No. 105-95, p. 96 (1997)).

Changes: Paragraph (a) has been amended to include the substance of the note, consistent with the above discussion, and the note has been removed.

Comment: Some commenters requested that § 300.232(c)(3) be revised to specify that an LEA may reduce its expenditures from one year to the next if the reduction is attributable to the termination of the LEA's obligation to provide a program of special education to a child with a disability that is an exceptionally costly program, as determined by the SEA, because the child no longer needs the program of special education, as determined in accordance with the IEP requirements at §§ 300.346 and 300.347.

Discussion: Because any change in the special education and related services provided to a child with a disability must be made in accordance with the IEP requirements, the requested revision is not necessary. The circumstances under which an LEA may reduce effort because it no longer needs to provide an exceptionally costly program are addressed by the regulations at § 300.232(c).

Changes: None.

Comment: Some commenters requested that the regulation be revised to require an LEA to submit to the SEA an assurance that all students with disabilities in the LEA are receiving a free appropriate public education, before the LEA would be permitted to reduce its expenditures.

Discussion: As part of its general supervision responsibility under § 300.600, each SEA is required to ensure that all public agencies in the State are complying with the requirement that they make FAPE available to all eligible children in their respective jurisdictions. Therefore, the requested revision is not necessary.

Changes: None.

Schoolwide Programs Under Title 1 of the ESEA (§ 300.234)

Comment: A commenter requested that, in § 300.234(b), the reference to § 300.230(a) be changed to also include § 300.230(b) or § 300.231(a). Another commenter asked if an LEA can use its State and local special education funds in a schoolwide program without accounting for expenditures of those funds for special education and related services, and added that if such use is allowable, could the State and local funds be considered in the LEA's maintenance of effort calculation.

Discussion: The reference in § 300.234 to § 300.230(a) in the NPRM should be changed to § 300.230(b). If Part B funds are used in accordance with § 300.234, the funds would not be limited to the provision of special education and related services. They could also be used for other school-wide program activities. However, children with disabilities in school-wide programs must still receive special education and related services in accordance with properly developed IEPs and must still be afforded all the rights and services guaranteed under the IDEA.

The use of IDEA funds in a schoolwide program does not change the LEA's obligation to meet the maintenance of effort requirement in § 300.231.

Consistent with the general decision regarding the disposition of notes, the note following § 300.234 would be removed. However, the note includes important guidance related to ensuring that children with disabilities in schoolwide program schools still receive services in accordance with a properly developed IEP, and still be afforded all of the rights and services guaranteed to children with disabilities under the IDEA. Therefore, this guidance should be added to the text of the regulation as a specific provision.

It should be pointed out that the use of funds under Part B of the Act in accordance with § 300.234 is beneficial to children with disabilities, and, contrary to informal concerns that have been raised, the use of the Part B funds in schoolwide programs does not deplete resources for children with disabilities. Rather, it helps to ensure effective inclusion of those children into the regular education environment with nondisabled children.

Changes: Paragraphs (b), (c), and (d) have been reorganized as paragraph (b) and (c) and revised to include the substance of the note. The note has been deleted.

Permissive Use of Funds (§ 300.235)

Comment: Some commenters requested clarification as to whether LEAs are still required to maintain "time and effort" or other records to document that Part B funds have been expended only on allowable costs. Other commenters expressed their concern that, with no limitation on the number of children who do not have disabilities who may benefit from special education and related services, the needs of children with disabilities will not be met. Some commenters asked that the regulation be revised to require regular financial audits to ensure compliance with the excess cost requirements.

Discussion: Section § 300.235 sets forth circumstances under which an LEA may use Part B funds to pay for the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability and to develop and implement a fully integrated and coordinated services system; this section does not impact the documentation requirements where an LEA uses a particular individual to provide special education or related services during one portion of the day or week and to perform other functions at other times for which the LEA cannot pay using Part B funds.

Although § 300.235 makes clear that Part B does not prohibit benefit to nondisabled children, it does not permit Part B funds to be expended in a regular class except for special education and related services and supplementary aids and services to a child with a disability in accordance with the child's IEP. If special education and related services are being provided to meet the requirements of the IEP for a child with a disability, this provision permits other children to benefit, and in such circumstances no time and effort records are required under Federal law, thus reducing unnecessary paperwork.

This provision does not in any way diminish an SEA or other public agency's responsibilities under Part B to ensure that FAPE is made available to each eligible child with a disability. Each SEA must, as part of its general supervision responsibility under § 300.600, ensure compliance with the requirements of § 300.235; the methods that the SEA uses to ensure compliance may include monitoring and financial audits of LEAs. Under the Single State Audit Act, SEAs are required to ensure that periodic audits are conducted, and the General Education Provisions Act requires periodic monitoring.

Changes: None.

Treatment of Charter Schools and Their Students (§ 300.241)

Comment: None.

Discussion: The proposed note clarified that the provisions of this part that apply to other public schools also apply to public charter schools, and, therefore, children with disabilities who attend public charter schools and their parents retain all rights under this part. The Senate and House Committee Reports on Pub. L. 105–17, which, in reference to this provision states:

> The Committee expects that charter schools will be in full compliance with Part B. (S. Rep. No. 105–17, p 17, H. R. Rep. No. 105–95, p. 97 (1997))

Thus, to ensure the protections of the rights of children with disabilities and their parents, this concept should be incorporated into the regulations.

Changes: The substance of the note has been incorporated into the discussion under § 300.18, and in the regulations under § 300.312. The note has been deleted.

Subpart C

Provision of FAPE (§ 300.300)

Comment: Some commenters expressed support for a seamless system of services for disabled children from birth through age 21, and recommended that Note 3 under § 300.300 be added to the regulation to highlight the need for States to plan their child find and other activities to meet the age range for FAPE. A few commenters stated their understanding that the exemption to the "50% rule" in § 300.300 (related to FAPE for disabled children aged 3 through 5 in States receiving a Preschool grant) was temporary, and asked if the exemption would continue in effect.

Discussion: In light of the previous discussion regarding the disposition of notes under this part (see "General Comments"), Note 3, which provides only clarifying information to explain why the age range for child find (birth through age 21) is greater than the age range for providing FAPE, should be deleted and not moved into the regulation. Further, Note 1 (FAPE applies to children in school and those with less severe disabilities) is no longer relevant as the statute now is commonly understood to apply to all children with disabilities, not just those out of school or with severe disabilities, and should be deleted. The substance of Note 2 (importance of child find to the FAPE requirement) should be incorporated into the text of the regulation at § 300.300(a)(2) because of the crucial role that an effective child find system plays as part of a State's obligation of ensuring that FAPE is available all children with disabilities.

The provision in § 300.300(b)(4) clarifies that if a State receives a Preschool Grant under section 619 of the Act, the "50% rule" does not apply with respect to disabled children aged 3 through 5 years, because the State must ensure that FAPE is available to "all" disabled children in that age range within the State—as a condition of receiving such a grant. (See §§ 301.10 and 301.12) Therefore, this provision should be included, without change, in these final regulations.

Changes: The substance of Note 2 has been added as a new paragraph (a)(2). Notes 1—3 have been removed.

FAPE—Methods and Payment (§ 300.301)

Comment: One commenter stated that there is no authority in Federal law to permit a State to use unlimited local resources to meet the State's requirement for FAPE, and recommended that the statement in § 300.301(a) related to using whatever State, local, or private sources of support be replaced by providing that a State may use all of its State funds to ensure FAPE. Some commenters requested that a new paragraph (c) be added to clarify that there can be no delay in the provision of FAPE while the SEA determines the payment source for IEP services.

Discussion: Section 300.301 is a long-standing provision that was included, without change, in the NPRM. The section merely clarifies that each State may use other sources of support for meeting the requirements of this part, in addition to State education funds or Part B funds.

It would be appropriate to add a new paragraph to § 300.301 to clarify that there can be no delay in implementing a child's IEP in any case in which the payment source for providing or paying for special education and related services to the child is being determined. Section 300.142 also addresses the role of the public agency in ensuring that special education and related services are provided if a noneducational agency fails to meet its responsibility and specifies that services must be provided in a timely manner, while the payment source for services is being determined. Further, because §§ 300.342 and 300.343 also address the timely development and implementation of a child's IEP, it is appropriate to include a reference to those sections in § 300.301.

Changes: A new paragraph (c) has been added to ensure, consistent with the above discussion, that there is no delay in providing services while the payment source is being determined.

Residential Placement (§ 300.302)

Comment: A few commenters requested that the regulations clarify that costs for residential placements include the expenses incurred by parents' travel to and from the program and the cost of telephone calls to the placement. One commenter stated that the LEA should be responsible for the educational costs if the system cannot meet the needs of the student, and that other appropriate related service agencies should assume the cost of care and treatment.

Discussion: Section 300.302 is a long-standing provision that applies to placements that are made by public agencies in public and private institutions for educational purposes. The note following this section should be deleted in light of the general decision to remove all notes from these final regulations.

A statement clarifying that costs for residential placements include the expenses incurred by parents' travel to and from the program and the cost of telephone calls to the placement is included in the analysis of comments on the definition of "special education" (see § 300.26). The regulations already address the respective responsibilities of the SEA, LEAs, and noneducational agencies under this part (see, for example, §§ 300.121, 300.142, and 300.220).

Changes: The note has been deleted.

Proper Functioning of Hearing Aids (§ 300.303)

Comment: Comments received on § 300.303 included requests to: (1) clarify that LEAs cannot ensure proper functioning of hearing aids unless students report non-working devices, especially students who are in private or out-of-school placements (because it is beyond the LEAs' capability to monitor whether devices are working); (2) provide that LEAs are not responsible for hearing aids damaged by misuse within non-school environments; (3) revise the section to address other AT devices; (4) ensure the provision is consistently met, using qualified persons who check aids on a regular basis, and (5) delete the note because it reflects 20 year-old appropriations committee report language, and, therefore, is no longer relevant. Other comments expressed concern that the section adds unnecessary paperwork and an unfair financial burden.

Discussion: Section 300.303 has been included in the Part B regulations since they were initially published in 1977. The note following § 300.303, which incorporated language from a House Committee Report on the 1978 appropriation bill, served as the basis for the requirement in § 300.303. That report referred to a study done at that time that showed that up to one-third of the hearing aids for public school children were malfunctioning; and the report stated that the [Department] must ensure that hearing impaired school children are receiving adequate professional assessment, follow-up, and services.

Section 300.303 was added to address that Congressional directive, and has been implemented since 1977. The Department has routinely monitored § 300.303; and when a violation has been identified, appropriate corrective action has been taken. Although it is important that § 300.303 be retained in the final regulations, the note is no longer relevant, and should be deleted.

Questions relating to damage of hearing aids are addressed in the analysis of comments on the definitions of assistive technology devices and services (see §§ 300.5 and 300.6).

Changes: The note following § 300.303 has been deleted.

Full Educational Opportunity Goal (§ 300.304)

Comment: Some commenters expressed support for § 300.304. One commenter stated that SEAs and LEAs should be required to improve the general quality of education in ways that will benefit the disabled, including submitting plans and timetables relating to such improvements. Another commenter recommended updating the note to use "people first" language consistent with the IDEA, as amended in 1990, and to make reference to quality education programs. Other commenters recommended that the note be deleted.

Discussion: The requirement that there be a goal of ensuring full educational opportunity to all children with disabilities predates the FAPE requirement in Pub L. 94–142. The IDEA Amendments of 1997 are sufficiently clear to not require an elaboration of the full educational opportunity goal. Further, in light of the general tenor of comments received on this section, and the comments and discussion relating to the disposition of notes (see analysis of general comments), it is clear that there would not be sufficient benefit gained to justify updating or retaining the note.

Changes: The note following § 300.304 has been deleted.

Program Options (§ 300.305)

Comment: Some commenters expressed support for this section, stating that disabled children must have the same opportunities as their nondisabled peers. One commenter stated that §§ 300.305 and 300.306 go beyond the new statute and are made moot by the provisions about including students in the regular curriculum as much as possible. Another commenter requested that the section be amended to make it clear that the list of items is not exhaustive.

Discussion: The provisions of §§ 300.305 and 300.306 do not go beyond the requirements of Part B of the Act. These are long-standing regulatory provisions that were included, unchanged, in the NPRM, and have been reinforced by the IDEA Amendments of 1997, through provisions requiring that children with disabilities be included in the general curriculum, and enabling them to meet State standards. The definition of the term "include" in § 300.13 makes it clear that the list of programs and services is not exhaustive. Therefore, the note following § 300.305 is unnecessary.

Changes: The note following § 300.305 has been deleted.

Nonacademic Services (§ 300.306)

Comment: One commenter stated that this section will require documenting an array of non-academic and extracurricular services and activities, and that it should be rephrased so that it will not lead to more unnecessary paperwork. Another commenter requested that the section be amended to clarify that participation in extracurricular activities is not a component of a disabled child's program.

Discussion: Section 300.306, as well as § 300.553 ("Nonacademic settings") are long-standing provisions that were included, without change, in the NPRM. There is no basis for assuming that the provisions in these sections will result in any unnecessary or increased paperwork.

Changes: None.

Physical Education (§ 300.307)

Comment: Several commenters requested that the regulations clarify that each public agency is responsible for making sure that special physical education (PE) (including adapted PE) is provided by qualified personnel, and not by classroom teachers, aides, related services personnel, or other unqualified personnel. One commenter stated that § 300.307(b) should replace "available to nondisabled children" with the phrase "to the extent available to all children."

Discussion: Section 300.307(b), which provides that each child with a disability has the opportunity to participate in the regular PE program available to nondisabled children, is clear as written, and there is no basis for making the change recommended by the commenters. It is not necessary to amend § 300.307 to state that specially designed PE must be provided by qualified personnel because SEAs are already required under § 300.136 to determine what standards must be met for all special education and related services personnel within the State. The note following § 300.307, which provided important guidance in the original regulations under this part, is no longer necessary, in light of the comments relating to the disposition of notes.

Changes: The note following § 300.307 has been deleted.

Assistive Technology (300.308)

Comment: Some commenters expressed support for § 300.308, stating that disabled students must have the tools they need to succeed. A few commenters requested that a note be added to describe what assistive technology (AT) devices would be available for children with hearing impairments, including deafness. One of the commenters requested listing specific devices (e.g., captioning, computer software, FM systems, and hearing aids).

Discussion: The AT devices for children with hearing impairments identified by the commenters are appropriate AT devices under this part. However, it is not necessary to list such devices in these regulations. Moreover, it would be inappropriate to list AT devices for one disability category without listing such devices for other disability categories. This position is consistent with the previously stated position related to including examples of AT devices in these regulations (see analysis of comments under §§ 300.5 and 300.6). Some examples of AT devices include word prediction software, adapted keyboards, voice recognition and synthesis software, head pointers, and enlarged print.

Under Section 504 of the Rehabilitation Act of 1973, 34 CFR Part 104, and the Title II of the Americans with Disabilities Act of 1990, 28 CFR Part 35, local educational agencies are responsible for providing a free appropriate public education to qualified students with disabilities who are within their jurisdiction. To the extent that assistive technology devices are required to meet the obligation to provide FAPE for an individual student, the devices must be provided at no cost to the student or his or her parents or guardians.

Changes: No change has been made to this section in response to these comments. See discussion under § 300.6 regarding a change to § 300.308.

Extended School Year Services (§ 300.309)

Comment: A number of commenters expressed support for this regulation. Because Notes 1 and 2 following § 300.309 provide important clarification regarding criteria for providing extended school year (ESY) services, some commenters recommended that these notes be added to the regulations.

Other commenters requested that § 300.309 be deleted because it has no statutory base, and could be interpreted to require ESY services for all disabled children regardless of what the child's IEP indicates is appropriate for the child. One comment noted that responsibility for providing ESY services will be extremely costly and likely will require large expenditures of local dollars.

Several commenters requested that both notes be deleted because Note 1 is ambiguous and unnecessary since the regulation is sufficiently clear, and Note 2 is not appropriate because all children regress in the summer.

Numerous comments were received regarding the standards referenced in Note 2 that States can establish for use in determining a child's eligibility for ESY services. One comment urged the adoption of a Federal standard and formula for determining unacceptable rates of recoupment. One recommendation was that while Note 2 should be added to the regulation, it should be changed to clarify that the list of factors is not exhaustive.

Another comment stated that "regression/recoupment" is a minimum standard that should be used in determining a child's eligibility for ESY services. Other commenters indicated that regression/recoupment is too narrow a standard, and recommended adding to the regulations additional criteria that courts have used to determine eligibility (e.g., whether the child has emerging skills, the nature or severity of the disability, and special circumstances, such as prolonged absence or other serious blocks to learning progress, which in the view of the IEP team could be addressed by ESY services).

Another comment recommended that the list of factors be revised to specify "evidence or likely indication of significant regression and recoupment." One comment recommended that the reference to "predictive data" be expanded to "predictive data and other information based on the opinion of parents and professionals."

Another comment stated that, although the regulation should incorporate Note 2 and permit States to establish standards for determining ESY eligibility, public agencies also should be required to make these standards available to parents either at IEP meetings or on request.

One comment recommended deleting Note 2 because it is too narrow and inconsistent with case law. According to the comment, the ESY standard should be flexible and permit consideration of a variety of factors (e.g., whether the child's current level of performance indicates that the child will not make "meaningful progress" during the regular school year in the general curriculum or in other areas pertinent to child's disability-related needs).

Several comments recommended other specific changes to § 300.309, such as the following: (1) Section 300.309(a)(2) should be revised to state that the determination of whether a child needs ESY services, including the type and amount of services, must be made by the IEP team and should be specified in the child's IEP; (2) the regulation should specify a timeline for determining eligibility for ESY services to enable the parents to take appropriate steps to challenge the denial of services; (3) the regulation should clarify whether ESY services are limited only to summer programming or to other breaks in the school calendar; and (4) no one factor can be the sole criterion for determining whether a child receives ESY services.

Another comment requested that clarification be added to specify that ESY services must be provided in the least restrictive environment, and that to ensure that this occurs, students with disabilities may have to receive ESY services in noneducational settings.

One comment requested that a note be added to clarify that the process for determining the length of a preschool child's school year must be individualized and described in the child's IEP/IFSP, and added that the decision is not necessarily based on school-aged ESY practices or formulas, which may be inappropriate for younger children, and that if a child turns three during the summer, the child should receive ESY services if specified in the IEP or IFSP.

Other comments requested that the regulations: add a new paragraph (c) to address the needs of disabled children enrolled in private facilities and include additional guidance relating to an LEA's obligation to conduct necessary evaluations during the summer when a child arrives in an LEA in the summer with an IEP from another LEA that requires ESY services.

Discussion: The regulation and notes related to ESY services were not intended to create new legal standards, but to codify well-established case law in this area (and, thus, ensure that the requirements are all in one place). Since the requirement to provide ESY services to children with disabilities under this part who require such services in order to receive FAPE is not a new requirement, but merely reflects the longstanding interpretation of the IDEA by the courts and the Department, including it in these regulations will not impose any additional financial burden on school districts.

On reflection and in view of the comments, it has been determined that this regulation should be retained, and that Note 1 following § 300.309, with some modifications, should be incorporated into the text of the regulation. Section 300.309 and accompanying notes clarify the obligations of public agencies to ensure that students with disabilities who require ESY services in order to receive FAPE have necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process. The right of an individual disabled child to ESY services is based on that child's entitlement to FAPE. Some disabled children may not receive FAPE unless they receive necessary services during time periods when other children, both disabled and nondisabled, normally would not be served. Both parents and educators have raised issues for many years about how determinations about ESY services can be made consistent with the requirements of Part B.

The clarification provided in Note 1 in the NPRM is essential to ensuring that public agencies do not limit eligibility for ESY services to children in particular disability categories, or the duration of these necessary services. Since these issues are key to ensuring that each disabled child who requires ESY services receives necessary services in order to receive FAPE, this concept from Note 1 should be incorporated into this regulation.

In the past, the Department has declined to establish standards for States to use in determining whether disabled children should receive ESY services. Instead, the Department has said that States may establish State standards for use in making these determinations so long as the State's standards ensure that FAPE is provided consistent with the individually-oriented focus of the Act and the other requirements of Part B and do not limit eligibility for ESY services to children in particular disability categories. These regulations continue this approach.

Within the broad constraints of ensuring FAPE, States should have flexibility in determining eligibility for ESY services, and a Federal standard for determining eligibility for ESY services is not needed. As is true for other decisions regarding types and amounts of services to be provided to disabled children under Part B, individual determinations must be made in accordance with the IEP and placement requirements in Part B.

Regarding State standards for determining eligibility for ESY services, Note 2 was not intended to provide an exhaustive list of such standards. Rather, the examples of standards that were included in Note 2 (e.g., likelihood of regression, slow recoupment, and predictive data based on the opinion of professionals) are derived from well-established judicial precedents and have formed the basis for many standards that States have used in making these determinations. *See, e.g.*, *Johnson* v. *Bixby ISD 4*, 921 F.2d 1022 (10th Cir. 1990); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC* v. *McDaniel*, 716 F.2d 1565 (11th Cir. 1983). It also should be pointed out that nothing in this part is intended to limit the ability of States to use variations of any or all of the standards listed in Note 2. Whatever standard a State uses must be consistent with the individually-oriented focus of the Act and may not constitute a limitation on eligibility for ESY services to children in particular disability categories.

To ensure that children with disabilities who require ESY services receive the services that they need, a high priority is being placed on monitoring States' implementation of this regulation in the next several years to ensure that State standards are not being applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary services. However, to give States needed flexibility in this area, the regulations should clarify that States may establish their own standards for determining eligibility for ESY services consistent with the requirements of this part.

To respond to a concern expressed in the comments that this regulation could require the provision of ESY services to every disabled child, regardless of individual need, paragraph (a)(2) has been revised to make clear that ESY services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§ 300.340–300.350, that the services are necessary for the provision of FAPE to the child.

Although it is important that States inform parents about standards for determining eligibility for ESY services, a regulatory change is not necessary. Since this matter is relevant to the provision of FAPE, it already would be included in the information contained in the written prior notice to parents provided under this part for children for whom ESY services are an issue.

There is no need to incorporate the IEP team's responsibility to specify the types and amount of ESY services. Section 300.309(a)(2) already specifies that the determination of whether a child with a disability needs ESY services must be made on an individual basis by the IEP team in accordance with §§ 300.340–300.350. These IEP requirements include specifying the types and amounts of services consistent with the individual disabled child's right to FAPE.

The determination of whether an individual disabled child needs ESY services must be made by the participants on the child's IEP team. In most cases, a multi-factored determination would be appropriate, but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. In all instances, the child's IEP team must decide the appropriate manner for determining whether a child is eligible for ESY services in accordance with applicable State standards and Part B requirements. Therefore, no requirements have been added to the regulation regarding this issue.

There is no need to specify a timeline for determining whether a child should receive ESY services. Public agencies are expected to ensure that these determinations are made in a timely manner so that children with disabilities who require ESY services in order to receive FAPE can receive the necessary services.

No further clarification has been provided regarding the times when ESY services can be offered. Section 300.309(b)(1)(i) specifies that ESY services are provided to a child with a disability "[b]eyond the normal school year of the public agency." For most public agencies, the normal school year is 180 school days. Typically, ESY services would be provided during the summer months. However, there is nothing in the definition of ESY services in § 300.309(b) that would limit the ability of a public agency to provide ESY services to a student with a disability during times other than the summer, when school is not in session, if the IEP team determines that the child requires ESY services during these time periods in order to receive FAPE.

There is no need to provide clarification regarding the comment that public agencies may wish to use different standards in determining eligibility of preschool-aged children with disabilities for ESY services from those used for school-aged children. Since Part B does not prescribe standards for determining eligibility for ESY services, regardless of the child's age, the issue of whether a State should establish a different standard for school-aged and preschool-aged children is a matter for State and local educational authorities to decide.

The IEP or IFSP will specify whether services must be initiated on the child's third birthday for children with disabilities who transition from the Part C to the Part B program, if the child turns three during the summer. This means that ESY services would be provided in the summer if the IEP or IFSP of a child with a disability specifies that the child must receive ESY services during the summer. In any case, the IEP or IFSP must be developed and implemented in accordance with the terms of those documents by the child's third birthday. These responsibilities are clarified elsewhere in these regulations.

No additional clarification is being provided in this portion of the regulations as to whether parentally-placed disabled students can receive ESY services. As is true for determinations regarding services for children with disabilities placed in private schools by their parents, determinations regarding the services to be provided, including the types and amounts of such services and which children will be served, are made through a process of consultation between representatives of public agencies and representatives of students enrolled by their parents in private schools. Through consultation, if a determination is made that ESY services are one of the services that a public agency will offer one or more of its parentally-placed disabled children, Part B funds could be used for this purpose.

No regulatory change has been made regarding the application of LRE requirements to ESY services. While ESY services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the public agency does not provide services at that time for its nondisabled children. However, consistent with its obligation to ensure that each disabled child receives necessary ESY services in order to receive FAPE, nothing in this part would prohibit a public agency from providing ESY services to an individual disabled student in a noneducational setting if the student's IEP team determines that the student could receive necessary ESY services in that setting. No further clarification is needed regarding the comment about requirements for evaluating students who move into LEAs during the summer to determine eligibility for ESY services. Requirements for child find are addressed elsewhere in these regulations.

Changes: Consistent with the above discussion, paragraph (a)(2) of § 300.309 has been revised, and a new paragraph (a)(3) has been added to this section to specify that (1) ESY services must be provided only if a child's IEP team determines the services are necessary for the provision of FAPE to the child; and (2) Public agencies may not limit eligibility for ESY services based on category of disability, and may not unilaterally limit types and amounts of ESY services. Notes 1 and 2 have been removed.

FAPE Requirements for Students With Disabilities in Adult Prisons (§ 300.311)

Comment: Several commenters requested that the regulation include a definition of "bona fide security or compelling penological interest that cannot otherwise be accommodated." Several commenters requested a definition that would clarify that this exception is to be used only in unique situations. These commenters requested that the definition specifically exclude routine issues of prison administration and convenience, cost-reduction measures, and policies to promote discipline or rehabilitation through systematic withholding of educational services which are otherwise required. Another commenter requested that the terms be defined to include prudent correctional administration, and physical or mental health determinations by prison health officials.

One commenter stated that the regulation should include guidance as to when an IEP or placement can be modified under the stated exception for modifications. Another commenter requested that the regulations clarify that modifications to IEP or placement may only be made by the IEP team and these changes are covered by the notice requirements of the Act.

Another commenter opposed services to students alleged to have committed heinous crimes and requested that a free appropriate public education be limited to those students who would otherwise be denied access to education services by virtue of their incarceration.

One commenter requested a definition of the term "last educational placement" to clarify that this means a public or private school placement.

Another commenter requested that a student's "potential" eligibility for early release be considered in determining eligibility for transition services.

Discussion: The requirement that the student's IEP team make an individualized determination regarding modifications to IEP or placement are clearly stated in the regulations. This requirement ensures that a team of professionals with knowledge about the student will be able to weigh the request of the State and make an individualized determination as to whether the State has demonstrated a bona fide security or compelling penological interest. In addition, the IEP team would need to consider possible accommodations of these interests and only decide to modify the IEP or placement in situations where accommodations are not possible. This provision also allows the State to address any issues specific to persons alleged of committing heinous crimes.

This provision does not impact an individual's eligibility for services, rather it allows the IEP team to make temporary modifications to the IEP or placement. These modifications are to be reviewed whenever there is a change in the State's bona fide security or compelling penological interest and at least on a yearly basis when the IEP is reviewed.

A definition of the terms "bona fide security or compelling penological interest" is not appropriate, given the individualized nature of the determination and the countless variables that may impact on the determination. Further, a State's interest in not spending any funds on the provision of special education and related services or in administrative convenience will not rise to the level of a compelling penological interest that cannot otherwise be accommodated, because States must accommodate the costs and administrative requirements of educating all eligible individuals with disabilities.

Further, since a modification to the IEP or placement is a change in the placement or in the provision of a free appropriate public education, the notice requirements under the Act would clearly be invoked.

There is no need to define the term "last educational placement" because the term is sufficiently clear.

Finally, there is no need to further clarify eligibility for transition services. Since consideration for transition services is also part of the IEP process, eligibility determinations should be addressed by the IEP team based upon the State's sentencing and parole policies, which may include potential eligibility for early release.

Changes: None.

Children With Disabilities in Public Charter Schools (§ 300.312)

See comments, discussion, and changes under § 300.18.

Children Experiencing Developmental Delays (§ 300.313)

See comments, discussion, and changes under § 300.7.

Initial Evaluations (§ 300.320)

Comment: A few commenters requested that the regulation be amended to require that initial evaluations be comprehensive so that each child is tested in all areas of possible disability, not just areas of suspected disability (e.g., a child who is having behavior problems may be acting out of frustration over unrecognized learning disabilities). Another commenter expressed concern that terms such as "in all areas of suspected disability" and the requirement to conduct evaluations in the native language do not appear in the NPRM, although they were in prior regulation and in Appendix A. Another commenter recommended that at least three diagnosticians from different disciplines actually evaluate a child, and added that this helps ensure that the evaluation is broad-based, nondiscriminatory, and relies on more than one method to determine eligibility.

One commenter recommended that § 300.320(a) repeat the language of the statute (i.e., that the LEA "shall conduct" initial evaluations, rather than "shall ensure that initial evaluations are conducted"); that the reference to applicable sections under §§ 300.530–300.536 be revised; and that other technical and conforming changes be made. A few commenters recommended amending § 300.320(b)(2) to add a provision requiring the IEP team to provide copies of all evaluations to the parents and all team members sufficiently in advance of the meeting at which they will be reviewed so that all have time to review the results prior to the meeting.

Discussion: The general requirement to conduct evaluations and reevaluations was added to Subpart C (§§ 300.320–300.321) in the NPRM to sequentially place evaluations as a preliminary step in determining a child's eligibility before convening an IEP team to develop the child's IEP. However, the specific evaluation requirements are included in Subpart E (§§ 300.530–300.536). Those requirements, especially the ones in § 300.532, are long-standing provisions that require the evaluations to be multifactored and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so. Section 300.532(g) makes clear that the evaluation must include "all areas related to the suspected disability."

If public agencies are in full compliance with these evaluation requirements, the initial evaluations will be sufficiently comprehensive to identify any disability that an individual child may have, including any disability that was not initially suspected. Further, the failure to provide such an evaluation is an implementation issue and not a regulatory issue. Therefore, no change is needed in this provision.

Section 300.320(a) of the NPRM states that each public agency "shall ensure that" a full and individual evaluation is conducted for each child with a disability. It is not necessary to substitute "shall conduct" for the language in the NPRM. The term used in the NPRM and in these final regulations places the burden squarely on the public agency to implement the evaluation requirements either directly, by using public agency staff to conduct the evaluations, or by contracting with other agencies or individuals to do so.

Technical and conforming changes that have been recommended should be reflected in these final regulations to the extent that they are determined to be relevant. For example, contrary to the commenter's recommendation, § 300.533 (determination of needed evaluation data) may be germane to initial evaluations as well as reevaluations, and, therefore should be included in the listed sections under § 300.320(b)(ii).

To the extent feasible, the results of evaluations conducted under this part should be provided to parents and appropriate school personnel before any meeting to discuss the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. However, this is an implementation matter that should be left to the discretion of individual public agencies. In administering the Part B program over the past 22 years, concerns about evaluation teams not having timely access to evaluation results have seldom been raised with the Department.

Changes: The authority citation for the section has been revised to add a reference to section 614(c) of the Act.

Reevaluations (§ 300.321)

Comment: Some commenters expressed support for § 300.321, and stated that the importance of sharing the evaluation information with the IEP team is vital. One commenter recommended that a wording change be made in § 300.321(b); that the reference to applicable sections under §§ 300.530–300.536 be revised; and that other technical and conforming changes be made.

Discussion: Technical and conforming changes as recommended by the commenter should be reflected in these final regulations, if relevant.

Changes: Paragraph (a) of § 300.321 has been amended to delete "§§ 300.530–300.536" from the list of applicable sections and replace it with "§ 300.536." Paragraph (b) has been revised to replace the term "used" with "addressed."

Definitions Related to IEPs (§ 300.340)

Comment: None.

Discussion: To clarify that IEPs are developed, reviewed, and revised at IEP meetings, a change would be made to paragraph (a) of this section. However, as the Committee reports to the Act noted:

> Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short-term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP team is reconvened in a timely manner to address those changes. (S. Rep. No. 105–17, p. 5 (1997); H. Rep. No. 105–95, pp. 100–101 (1997))

SEA Responsibility for IEPs(§ 300.341)

Comment: A few commenters stated that the manner in which the term "that agency" is used in § 300.341 is confusing because it is not always clear whether the term is applying to the SEA or to other agencies described in the section and in Note 1, and requested that appropriate changes be made. One commenter stated that additional language is needed in the section to expand on the State's ultimate obligation to ensure district compliance with all IDEA requirements.

Several comments were received relating to § 300.341(b). One commenter stated that "religiously-affiliated" may be broader than parochial, but it inadvertently excludes private schools with a religious focus that are *not* affiliated but rather are freestanding, and recommended using "religiously-oriented" instead. Another commenter recommended using only "private school," and deleting "religiously affiliated," stating that there is no basis for using that term.

Some commenters stated that the term "IEP" has an explicit meaning in IDEA—as an inherent component of FAPE, and recommended that another term other than "IEP" be used with respect to children in private schools, who are not entitled to FAPE. Another commenter recommended that the statement requiring that an IEP is developed and implemented be revised to include a reference to the proportionate expenditure requirements in Subpart D.

One commenter recommended that the statement in § 300.341(b)(2)(ii) regarding "special education or related services" be amended to replace "or" with "and" in order to avoid any implication that a child may receive only related services. Another commenter suggested deleting the entire reference to related services.

One commenter recommended requiring that (1) any nonpublic school that is licensed by the SEA or receives any other tax or benefit from the State must develop an IEP for each disabled student, and (2) LEAs provide the student with a supplemental IEP showing the additional services that the LEA will provide.

Discussion: The language of this section, and especially the note, should be modified to ensure that the term "SEA" is used consistently, to avoid the confusion identified by the commenters. This can best be accomplished, and the section strengthened, by moving the substance of the note into the text of the regulation. The comment related to ensuring compliance with all provisions of IDEA is addressed by § 300.600, which provides that the SEA is responsible for ensuring such compliance.

In drafting the NPRM the term "religiously-affiliated" was adopted instead of the statutory term "parochial," based on the assumption that Congress intended that all religious schools be included, not just those organized on a parish basis. The intent was for the broadest possible coverage. However, in light of the comment related to this matter, the term "religiously-affiliated" does not account for other religious schools that are not affiliated. The term should be replaced with the more comprehensive term "religious schools." That term will be used throughout these regulations to replace "religiously-affiliated."

Another term other than "IEP" should be used with respect to disabled children who are enrolled by their parents in private schools. As noted by the commenters, (1) "IEP" is an inherent component of, and an explicit term used in, the statutory definition of "FAPE", and (2) the private school provisions in the IDEA Amendments of 1997 and § 300.454(a) make it clear that these children have no individual right to receive some or all special education and related services that they would be entitled to if enrolled in a public school.

Therefore, if it is determined, in accordance with § 300.454(b) (Consultation with representatives of private school children with disabilities), that a given child is to receive special education and related services under this part, the document used to denote those services should have a different name. The term "services plan" has been adopted as an appropriate term for use with these children.

Further, in light of the comments related to this section, and the discussion in the preceding paragraph, all provisions related to parentally-placed children in religious or other private schools (including the provisions in proposed §§ 300.341(b)(2) and 300.350) should be incorporated, in revised form, under Subpart D (Children in Private Schools).

The statute does not require a private school to unilaterally develop an IEP for each disabled child enrolled in the school, or to require a supplemental IEP for additional services that the LEA will provide.

Changes: The name of § 300.341 has been changed to "Responsibility of SEA and other public agencies for IEPs." The paragraph headings have been deleted, and § 300.341 has been revised consistent with provisions in Subpart D regarding parentally-placed children with disabilities in religious or other private schools. A new paragraph (b) incorporates the substance of the note following § 300.341, to clarify that the provisions of the section (related to public agencies) also apply to the SEA, if the SEA provides direct services under § 300.370(a) and (b)(1). The note has been deleted. The section has been further revised by making other technical and conforming changes. A new paragraph has been added to § 300.452(b) related to the SEA's responsibility for eligible children enrolled in religious schools.

When IEPs Must Be in Effect (§ 300.342)

Comment: Some commenters stated that, as used in § 300.342(b)(2) and Note 1, the terms "as soon as possible" and "undue delay" are not meaningful and should be defined or clarified. The commenters recommended that an outside timeline (e.g., 15 days following the IEP meetings described in § 300.343) be established for implementing IEPs. Other commenters requested that Note 1 be deleted. A few commenters indicated that the statement in Note 1 (regarding services not being provided during the summer or a vacation period unless the child requires such services) does *not* adequately identify LEAs' obligations.

Discussion: It would not be appropriate to add an outside timeline under § 300.342(b) for implementing IEPs, especially when there is not a specific statutory basis to do so. However, with very limited exceptions, IEPs for most children with disabilities should be implemented without undue delay following the IEP meetings described in § 300.342(b)(2).

There may be exceptions in certain situations. It may be appropriate to have a short delay (e.g., (1) when the IEP meetings occur at the end of the school year or during the summer, and the IEP team determines that the child does not need special education and related services until the next school year begins); or (2) when there are circumstances that require a short delay in the provision of services (e.g., finding a qualified service provider, or making transportation arrangements for the child).

If it is determined, through the monitoring efforts of the Department, that there is a pattern of practice within a given State of not making services available within a reasonable period of time (e.g., within a week or two following the meetings described in § 300.343(b)), this could raise a question as to whether the State is in compliance with that provision, unless one of the exceptions noted above applies.

Changes: Paragraph (b) of this section is amended (consistent with the discussion under § 300.344(a)(2) and (3) of this Analysis) to require that each public agency must ensure that (1) a child's IEP is accessible to each regular education teacher, special education teacher, related services provider and other service provider who is responsible for its implementation; and (2) each of the child's teachers and providers is informed of his or her specific responsibilities related to implementing the child's IEP, and of the specific accommodations, modifications, and supported that must be provided for the child in accordance with the IEP. Note 1 has been deleted. Note 2 (related to a 1997 date certain for certain requirements regarding students with disabilities incarcerated in adult prisons) also has been deleted. Subject headings have been added to each paragraph in the section.

Comment: Several commenters expressed concern about § 300.342(c) and Note 3 (related to using an IFSP for a child aged 3 through 5), and some of the commenters recommended deleting paragraph (c)(2) and the reference to it in Note 3. The commenters stated (for example) that (1) IFSPs should be used for children under age 3, and IEPs for older children, and parents should not have a choice; (2) an IFSP may not be appropriate in the educational setting; (3) the requirement is inconsistent with OSEP policy letters; (4) the use of an IFSP or IEP requires only the two factors in § 300.342(c)(1) (i.e., it is consistent with State policy, and agreed to by the parents and the agency); and (5) because Note 3 and the preamble to the NPRM indicate a clear preference for an IEP rather than IFSP, a specific rationale should be given.

One commenter requested that Note 3, or Appendix A, be amended to underscore that special care must be taken by LEAs in agreeing to continue children's IFSPs when they become eligible for an IEP—especially if the IFSP does not have an educational component, because research has shown a significant positive difference in school readiness for kindergarten when children whose (prekindergarten) program included an educational component, as compared to those who attend custodial day care without an educational component. Another commenter requested that § 300.342(c) be revised to allow use of IFSPs for children aged 3 and above without meeting the requirements in paragraph (b)(2).

Discussion: It is important to retain in these final regulations the general thrust of § 300.342(c) from the NPRM (related to requiring parental consent to using an IFSP in lieu of an IEP for a child who moves from the Early Intervention Program under Part C of the Act to preschool services under Part B of the Act). As a result of the IDEA Amendments of 1997, there have been significant changes in the statute, including an increased emphasis on the participation of children with disabilities in the general curriculum, and on ensuring better results for children with disabilities. Because of the importance of the IEP as the statutory vehicle for ensuring FAPE to a child with a disability, paragraph (c)(2) of this section provides that the parents' agreement to use an IFSP for the child instead of an IEP requires written informed consent by the parents that is based on an explanation of the differences between an IFSP and an IEP.

As noted by at least one commenter, research has shown a significant positive difference in school readiness for kindergarten if children's "prekindergarten" programs included an educational component, compared to those who attend custodial day care without an educational component. In addition, the provisions related to the IFSP under Part C can generally be replicated under Part B. Because of the definition of "FAPE," services that are determined necessary for a child to benefit from special education must be provided without fees and without cost to the parents.

Changes: Note 3 has been deleted.

Comment: Some commenters expressed support for § 300.342(d) in the NPRM (i.e., that all IEPs in effect on July 1, 1998 must meet the new requirements in §§ 300.340–300.351), stating that public agencies have had since June 4, 1997 to prepare for changes in the IEP requirements, many of which have already been in use in some agencies. A few of the commenters requested that all IEPs developed during the spring and summer of 1998 be in full compliance with the new requirements.

A large number of commenters expressed concern about § 300.342(d), stating (for example) that it (1) is inconsistent with section 201(a)(2)(A) of the Act; (2) will result in massive national noncompliance and public financial liability; and (3) force pro forma IEPs that will result in frustration and resentment on the part of parents and local providers. The commenters requested that the requirements be changed to provide that IEPs written on or after July 1, 1998 must meet the new requirements.

Discussion: It is appropriate to amend § 300.342(d) to provide that IEPs developed, reviewed, or revised on or after July 1, 1998 must comply with the requirements in section 614(d) of the Act and §§ 300.340–300.350 of these final regulations. While we commend the many public agencies that began as soon as the IDEA Amendments of 1997 was enacted to implement the new statutory requirements and already have in place IEPs that meet these requirements, other public agencies argued compellingly that they simply did not have the wherewithal to ensure that, on July 1, 1998, all IEPs would fully comply with the new IEP requirements, and that a phase-in period should be adopted in which the anniversary date for each child's IEP meeting would be the basis for revising the child's IEP to comply with the new requirements.

Requiring IEPs developed on or after July 1, 1998 to meet the new requirements should result in more meaningful IEPs that focus on effective implementation, consistent with the purposes of the IDEA Amendments of 1997. At the same time, public agencies are strongly encouraged to grant any reasonable requests from parents for an IEP meeting to address the new IEP provisions. Public agencies are also encouraged to inform parents of the important changes resulting from the new IEP requirements so that they may be effective partners in the education of their children.

Changes: Section 300.342(d) has been revised to state that all IEPs developed, reviewed, or revised on or after July 1, 1998 must meet the requirements of §§ 300.340–300.350.

IEP Meetings (§ 300.343)

Comment: One commenter stated that, as written, § 300.343(b)(1) implies that an LEA is required to make an offer of services in accordance with an IEP whether or not the child qualifies (i.e., before the child is evaluated), and requested clarification of the provision. Other commenters stated that the requirement should begin with referral, not consent, and "services" should be referenced as "special education and related services."

Some commenters expressed support for the 30 day timeline in § 300.343(b)(2) (i.e., that an IEP meeting is conducted within 30 days of determining that a child needs special education). A few commenters requested changing the provision to 30 "school days." One commenter recommended amending the provision to recognize that regular education teachers are not available in the summer, because to the extent participation of a regular education teacher is required at the IEP meeting, the meeting would have to wait until teachers return.

A number of comments were received relating to § 300.343(c)(1) (Review and revision of IEPs). One commenter requested that paragraph (c)(1) be amended to clarify that a child's IEP is reviewed periodically if warranted, or requested by the child's parent or teacher, and to include additional language related to determining if the child is making meaningful progress toward attaining the goals and standards for all children as well as goals and short term objectives or benchmarks. Other commenters recommended requiring that a review meeting be held when requested by an IEP team member, and that LEAs honor "reasonable" requests from parents for timely IEP review meetings.

One commenter requested amending paragraph (c)(2)(i) (related to revising a child's IEP to address any lack of progress in the annual goals) by adding benchmarks or short term objectives to the statement related to annual goals. A few commenters recommended deleting the reference to "Other matters" in § 300.343(c)(2)(v) as the language is redundant and confusing.

A few commenters requested that a new § 300.343(d) be added to incorporate the statutory requirement in section 614(c)(4) (i.e., procedures to follow when the IEP team determines that no additional data are needed to determine whether the child continues to be a child with a disability). One commenter felt that an additional note should be added to encourage combining the eligibility meeting with the initial IEP meeting.

Discussion: There is potential for confusion with the language in § 300.343(b)(1) of the NPRM regarding whether a child must be evaluated before the offer of services is made. It also would be more appropriate to refer to "special education and related services" rather than referring simply to "services."

While the basic position taken in the NPRM with respect to § 300.343(b)(1) has been retained (i.e., an offer of services will be made to parents within a reasonable period of time from the public agency's receipt of parent consent to initial evaluation), the concept of "making services available" to a child with a disability seems more relevant to these final regulations than "offer of services" in ensuring that FAPE is available to a child with a disability in a timely manner.

Therefore, the regulations should be amended to clarify that, within a reasonable period of time following consent to an initial evaluation, the evaluation is conducted; and if the child is determined eligible under this part, special education and related services are made available to the child, in accordance with an IEP.

It would not be appropriate to change the reference to § 300.343(b)(1) from "parent consent" to "referral" because informed consent of the parents is a necessary step in ensuring that the evaluation will be conducted.

It also would not be appropriate to change the 30 day timeline in § 300.343(b)(2) to 30 "school days." That timeline is a long-standing provision that has been appropriately implemented since the inception of the regulations under this part, and there is no basis to make such a change.

A provision is not necessary to clarify that public agencies will honor "reasonable" requests by parents for a meeting to review their child's IEP. Public agencies are required under the statute and these final regulations to be responsive to parental requests for such reviews. If a public agency believes that the frequency or nature of the parents' requests for such reviews is unreasonable, the agency may (consistent with the prior notice requirements in § 300.503) refuse to conduct such a review, and inform the parents of their right to request a due process hearing under § 300.507. It should be noted, however, that as a general matter, when a child is not making meaningful progress toward attaining goals and standards applicable to all children, it would be appropriate to reconvene the IEP team to review the progress.

It is inappropriate and unnecessary to add "benchmarks or short-term objectives" to the statement on annual goals in § 300.343(c)(2)(i). The language in that paragraph, which incorporates the language from the statute, refers to "the annual goals described in § 300.347(a)." Section 300.347(a) states that each child's IEP must include "A statement of measurable annual goals, including benchmarks or short-term objectives * * *". Therefore, benchmarks or short-term objectives are inherent in § 300.343(c)(2)(i), and do not need to be repeated.

It is not necessary to include a note encouraging public agencies to combine the eligibility and initial IEP meetings. This is an individual State option that many States have unilaterally elected to follow in implementing Part B of the Act over the past 22 years, while other States have determined that the better course is to hold separate meetings.

Changes: The title of § 300.343(b) has been changed from "Timelines" to "Initial IEPs; provision of services." Paragraph (b)(1) has been amended to (1) clarify that, within a reasonable period of time from the agency's receipt of consent to an initial evaluation, "the evaluation is conducted", and (2) clarify the timing issue by replacing "offer of services * * * is made to parents" with "special education and related services are made available to the child * * *". Paragraph (b)(2) has been changed by replacing the phrase "In meeting the timeline in paragraph (b)(1)" with "In meeting the requirement in paragraph (b)(1)." In the title to § 300.343(c), the term "IEP" has been changed to "IEPs." Paragraph (c)(2)(ii) has been revised to correctly cite § 300.536. The authority cite has been changed from "1414(d)(3)" to "1414(d)(4)(A)."

Comment: A number of comments were received on the note following proposed § 300.343 (regarding the offer of services within 60 days of parent consent to initial evaluation). Some commenters expressed support for the 60 day time frame, stating that (1) many LEAs experience significant delays in completing evaluations, especially during the summer, and delay providing FAPE for a very long time, and (2) if LEAs respond to requests for evaluation in a timely manner, 60 days is reasonable. Many of these commenters recommended that the note be added to the regulation.

Other commenters recommended deleting the 60 day timetable in the note, stating that (1) the timeline is not a reflection of the statute, and Federal guidance is not necessary because most States have set reasonable, child-friendly timetables for the initial provision of services; (2) it is unrealistic, unreasonable, and ambiguous (3) it would override time frames set by States, (4) the Department could continue to monitor the issue of reasonableness in each State without the timeline; and (5) while IEPs generally can be implemented within 60 days, this non-statutory requirement should not become the standard for all cases.

Some commenters recommended changing the length of the timelines (e.g., to 75 days, 80 days, 90 days, or 120 days), or using the designation of "school days" or "operational days," or adding a caveat exempting school breaks and holidays from the 60 day timeline. One commenter requested a clarification of timelines when the initial evaluation occurs with less than sixty days remaining in the school year.

Discussion: While it is critical that each public agency make FAPE available in accordance with an IEP within a reasonable period of time after the agency's receipt of parent consent to an initial evaluation, imposing specific timelines could result in the timelines being implemented only in a compliance sense, without regard to meeting the spirit of the requirement, and this may not always serve the best interests of the children involved.

Moreover, as indicated by some of the commenters, most States are able to meet a timeline of 60 days. The Department considers this to be reasonable, and will not make a finding of noncompliance when monitoring a State that is meeting the 60 day timeline for most children.

It is recognized, however, that it may, for some children, take longer, and for some, it could be done in a shorter period of time. Therefore, the note following § 300.343 should be deleted, and no timelines should be added to the final regulations relating to the concept of "within a reasonable period of time." Although no specific timeline is given, implementation should be done with all due haste.

Changes: The note following § 300.343 has been removed.

IEP Team (§ 300.344)

Comment: A wide variety of general comments was received regarding this section. Some commenters believe that anyone expected to implement the IEP should attend the IEP meeting. Numerous comments were received regarding the note to this section of the NPRM. Some commenters believed that the note should be deleted in its entirety because it went beyond the statute, while other commenters recommended that only portions be deleted, or that the note be included in the regulations instead. Other commenters requested a limitation on the number of people that could attend IEP meetings, with provision for an exception when necessary.

Other commenters suggested that there should be a requirement that an appropriate member of the IEP team meet with every teacher that works with a student to explain goals and objectives contained in the IEP and accommodations and modifications required by the teachers.

Discussion: In response to commenters' recommendations and in light of the general decision not to use notes in these final regulations, the note following this section of the NPRM should be removed as a note. However, substantive portions should be incorporated, as appropriate, into pertinent provisions of this section, reflected in questions and answers on IEP requirements that are contained in Appendix A to these regulations, or addressed in the discussion of comments regarding this section.

No limitation on the number of individuals who can attend IEP meetings should be imposed, as requested by commenters, since these determinations are left to parents and public agencies, based on the requirements of this section. These requirements are sufficient to ensure that membership on the IEP team is limited to individuals who have particular knowledge or expertise to bring to the meeting. No clarification is needed here with regard to accommodations and modifications for all personnel who implement a child's IEP, since that requirement is addressed under § 300.346(d)(2) of these regulations.

Changes: The note following this section of the NPRM has been removed.

Comment: Some commenters recommended that this regulation be amended to specify that parents can bring "advocates of their choice" to their child's IEP meetings. Other commenters recommended that the regulation be clarified to state that parent support personnel can attend IEP meetings if requested by the parent, and that if the district disagrees with the attendance of a person invited by the parent, they may file a complaint but must not prohibit that person from attending the meeting.

Commenters also requested clarification regarding how the public agency would document that it has ensured that the parent actually has been given the opportunity to participate meaningfully at their child's IEP meeting.

Discussion: As numerous commenters emphasized, it is essential that parents are given the opportunity to participate meaningfully as members of their child's IEP team. In many situations, an IEP meeting can be a very intimidating experience for many parents, even if the LEA encourages their active participation. Frequently, as commenters have suggested, parents would be assisted greatly at their child's IEP meetings if another person could accompany them. It is important to point out that under IDEA and the original regulations for this program, parents always have been afforded the opportunity to bring a friend or neighbor to accompany them at their child's IEP meeting. Question 26 in the Notice of Interpretation on IEP requirements, published as Appendix A to 34 CFR part 300, in 1981, stated in a note that, in some instances, parents might elect to bring another participant to the meeting, e.g., a friend or neighbor, someone outside of the agency who is familiar with applicable laws and with the child's needs, or a specialist who conducted an independent evaluation of the child.

Many parents traditionally have brought other individuals to accompany them to their child's IEP meeting as a way of ensuring their meaningful participation. Therefore, in response to commenters' suggestions and to ensure that meaningful parent participation at their child's IEP meeting is preserved, a new paragraph (c) should be added to this section.

Changes: Section 300.344 has been amended by adding a new paragraph (c) to clarify that "[T]he determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section shall be made by the party (the parents or the public agency) who invited the individual to be a member of the IEP team."

Comment: Numerous commenters addressed the requirement in proposed § 300.344(a)(2) and the pertinent portions of the note regarding the role of the regular education teacher as a member of the child's IEP team if the child is, or may be, participating in the regular educational environment. Some commenters were supportive of the participation of the regular education teacher at an IEP meeting, agreeing that at least one regular education teacher of the child should be an IEP team member. Some commenters also pointed out that problems surrounding placement of a child with a disability in the regular classroom cannot be addressed without adequate preparation or participation of teachers of those classes in the IEP meeting.

Those commenters opposed to the requirement cited potential costs. Some commenters also pointed out that, for children with disabilities taking a number of subjects, it will be impossible to bring all teachers together, while a single teacher will not have the requisite expertise on a variety of subjects.

Other commenters who were supportive of the regular education teacher's participation in principle, and acknowledged the importance of obtaining input from a regular education teacher, recommended a more flexible approach. These commenters felt that a requirement that a regular education teacher be present at every IEP meeting would interfere with the ability of regular education teachers to provide the necessary instruction to all children in their classrooms, both with and without disabilities. Specific recommendations that commenters made for regulatory changes were (1) the reference to regular educational environment in § 300.344(a)(2) should be replaced with language such as, if the child is, or may be, participating in a non-special education classroom; (2) the reference to regular education teacher should be replaced with general education teacher or person knowledgeable about the general education curriculum at the child's grade level; (3) the participation of a regular education teacher is required only if issues arise regarding behavior or socialization, making the input necessary; and (4) a regular education teacher must attend if the child with a disability is, or may be, receiving instruction from a regular education teacher during the period of time covered by the proposed IEP.

Commenters made a number of other suggestions concerning which IEP meetings the regular education teacher needs to attend and how those determinations could be made, such as, (1) the regular education teacher must attend only the annual IEP review meeting, but that attendance at other meetings should be on an as-needed basis; (2) there should be no requirement that the regular education teacher be physically present at the IEP meeting, but must be given the opportunity to provide oral or written input about the child and appropriate instructional strategies; (3) the regular education teacher must attend to the extent appropriate; (4) the IEP team must consult with the regular education teacher to the extent appropriate, and determine whether it is necessary for the regular education teacher to attend all or part of the meeting; and (5) attendance is at the option of the regular education teacher, who also can appoint an individual of his or her choice who has had experience with the child and/or has had adequate pre-planning time with special education personnel.

Other commenters asked whether other individuals could be substituted for the regular education teacher's participation at IEP meetings, such as, (1) a special education teacher who is knowledgeable about the general curriculum; (2) a school counselor, particularly for high school students; (3) an individual certified as a regular education teacher, regardless of whether that individual is currently working with the child; and (4) for children who are receiving only speech-language services, a regular education teacher need not participate.

Commenters also requested that the regulations be clarified to state that school officials will not be deemed to have predetermined placement solely because a regular education teacher is not present at an IEP meeting. In the event that a regular education teacher does not attend, commenters asked if that regular education teacher would be required to provide input regarding the regular curriculum, and, if so, how this would be accomplished and documented.

Numerous commenters expressed concerns regarding confidentiality of IEPs if regular education teachers who did not attend the meeting are provided copies. Some commenters suggested that there be a central location for all IEPs, and the regulation make explicit that there are limitations on redisclosure of information in IEPs to others.

Discussion: Based on careful consideration of comments as well as applicable statutory requirements, § 300.344(a)(2) should be retained in these final regulations, but additional clarification should be provided in Appendix A and in § 300.342(b) of these regulations.

Section 614(d)(1)(B)(ii) of the Act specifies that the IEP team must include "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)." This statutory provision therefore prescribes that for any child who is, or may be participating in the regular educational environment, that child's regular education teacher must be a member of the child's IEP team. The child's regular education teacher's membership on the IEP team is particularly important to meeting the statutory requirement in section 614(d)(1)(A)(ii)(I) of the Act that the IEP explain how the child's needs will be met so that the child can be involved in and progress in the general curriculum.

In implementing the requirement for membership of a regular education teacher on the IEP team, the public agency will determine which teacher or teachers of the child will fulfill that function to ensure participation of at least one regular education teacher in the development, review, and revision of the child's IEP, to the extent appropriate, in accordance with section 614(d)(3)(C) of the Act. (*See* discussion of § 300.346(d) of these regulations).

In addition, it would be highly beneficial to the education of children with disabilities to ensure that those regular education teachers and other service providers of the child who are not members of the child's IEP team are informed about the contents of a child's IEP to ensure that the IEP is appropriately implemented.

Whether the child's regular education teacher must be physically present at an IEP meeting, and to what extent that individual must participate in all phases of the IEP process, are matters that must (1) be determined on a case-by-case basis by the public agency, the parents, and other members of the IEP team, and (2) be based on a variety of factors. This issue is discussed in more detail in a question and answer contained in Appendix A to these final regulations. Since the statutory language is incorporated into this regulation verbatim, no changes should be made regarding the use of the term "regular education teacher," or the statutory language regarding the regular educational environment.

It is important to point out that the statute specifies that at least one regular education teacher of the child is a member of the IEP team. Therefore, the suggestions of commenters that other individuals could participate in lieu of the child's regular education teacher as the regular education teacher member of the child's IEP team should not be adopted; however, as stated in the note to this section in the NPRM, the regular education teacher participating in a child's IEP meeting should be the teacher who is, or may be, responsible for implementing the IEP, so that the teacher can participate in discussions about how best to teach the child.

If the child has more than one regular education teacher, the LEA may designate which teacher or teachers of the child will participate on the IEP team. While all regular education teachers of the child need not attend the child's IEP meeting, their input should be sought, regardless of whether they attend. In addition, each public agency must ensure that (1) the child's IEP is accessible to each regular education teacher (and to each special education teacher, related services provider and other service provider) who is responsible for its implementation, and (2) each of the child's teachers and providers is informed of his or her specific responsibilities related to implementing the child's IEP, and of the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP. This provision is necessary to ensure proper implementation of the child's IEP and the provision of FAPE to the child. However, the mechanism that the public agency uses to inform each teacher or provider of his or her responsibilities is left to the discretion of the agency.

It is expected that the circumstances will be rare in which a regular education teacher would not be required to be a member of the child's IEP team. However, there may be situations in which a child is placed in a separate school and participates only in meals, recess periods, transportation, and extracurricular activities with nondisabled children and is not otherwise participating in the regular educational environment, and no change in that degree of participation is anticipated during the next twelve months. In these instances, since there would be no current or anticipated regular education teacher for a child during the period of the IEP, it would not be necessary for a regular education teacher to be a member of the child's IEP team.

No further clarification should be provided in response to commenters' concerns about the potential for violation of requirements regarding confidentiality of information if copies of a child's IEP are distributed to regular education teachers or other school personnel who did not attend the IEP meeting. These regulations contain confidentiality requirements at §§ 300.560–300.577 that are modeled after those in the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232(g), which also applies to this program.

While FERPA does not protect the confidentiality of information in general, it prohibits the improper disclosure of information from education records and generally protects parents' and students' privacy interests in "education records." Records regarding an individual student's disability maintained by an educational agency or institution or by a party acting for the agency or institution are education records under FERPA. Therefore, a child's IEP is an "education record" which is subject to FERPA.

Under FERPA and Part B, the prior written consent of the student's parent or of the eligible student must be obtained for disclosure of personally identifiable information in education records, unless one of the authorized exceptions to the prior written consent requirement is applicable. (34 CFR 99.30 and 300.571 (a)(2) and (b)).

Under 34 CFR 99.31(a)(1), educational agencies or institutions, under certain circumstances, may disclose personally identifiable information in education records without prior written consent to school officials with legitimate educational interests. Each educational agency or institution must provide annual notification regarding how it meets the requirements of FERPA. This annual notification under FERPA must include a statement indicating that the parent or eligible student has a right to consent to disclosure of personally identifiable information, and the exception permitting nonconsensual disclosures to school officials with legitimate educational interests must be described.

The criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest also must be specified in this annual notification. (34 CFR 99.7(a)(3)). Accordingly, an educational agency or institution may disclose information from education records to teachers and other school officials who meet the criteria set forth in the agency's or institution's notice and must restrict access by other school employees who do not fall within an exception, unless consent to the disclosures is obtained. Although regular education teachers who fall within this exception also may disclose education records to other school officials with legitimate educational interests, those officials are subject to the restrictions on redisclosure in 34 CFR 99.33.

Public agencies also may find it practical to store education records in one central location to limit access to those individuals to whom the agency or institution is permitted to disclose personally identifiable information without prior consent.

Changes: Section 300.342(b) has been amended, consistent with the above discussion.

Comment: Commenters requested that "special education provider" be defined and that clarification be provided to indicate when a special education provider could attend an IEP meeting in lieu of a special education teacher. Other commenters asked if a paraprofessional could attend an IEP meeting in lieu of a special education teacher or special education provider. Some commenters recommended that the regulations clarify that it would not be permissible for a paraprofessional to be substituted for a qualified special education teacher or provider as an IEP team member.

Commenters also recommended clarification that parents should be informed about the qualifications of the IEP team members and degree to which the IEP is being implemented by what commenters referred to as "non-qualified personnel."

Discussion: Section 300.344(a)(3) of these final regulations implements section 614(d)(1)(B)(iii) of the Act, which gives the public agency the flexibility to determine whether the child's special education teacher or special education provider should be a member of the child's IEP team. The special education teacher or provider who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP. For example, if the child's disability is a speech impairment, the special education teacher or special education provider could be the speech-language pathologist.

While there is no statutory requirement that public agencies inform parents of the qualifications of members of the IEP team, there is nothing in these regulations that would preclude public agencies from providing parents with this type of information. Public agencies are encouraged to grant reasonable requests from parents for such information.

Changes: None.

Comment: Numerous commenters requested that language from Appendix A about the public agency's ability to commit agency resources be added to the regulation. Commenters emphasized that it was especially important that the individual attending an IEP meeting in the capacity of public agency representative must be an individual such as an LEA administrator who is qualified to develop specially designed instruction and have authority to make decisions regarding LEA resources.

To give LEAs flexibility in their representation, some commenters suggested that the public agency representative should be an individual who can interpret the instructional implications of evaluation results and may be a member previously described. Other commenters emphasized that the requirement for participation of a public agency representative could be burdensome for rural States, and recommended that the regulations be clarified to indicate that IEP team members could fulfill dual functions so that responsibility of the public agency representative could be delegated to another team member.

Some commenters requested that the regulation be amended to provide that if particular services are not available in the district, lack of availability does not relieve the school district of its obligation either to provide needed services to a disabled child, or to include those services on a child's IEP.

Discussion: The three criteria enumerated in the statute at section 614(d)(1)(B)(iv) describing the representative of the public agency who is a member of the IEP team are incorporated into § 300.344(a)(4) of these final regulations. The statute should not be read to prohibit the public agency from designating another member of the IEP team to act as the public agency representative, if that individual meets the specified criteria for each role. Therefore, a new paragraph (d) should be added to § 300.344 regarding a public agency's authority to designate another IEP team member as the public agency representative member of the IEP team, so long as the criteria in § 300.344(a)(4) are satisfied.

Changes: Section 300.344 has been amended by adding a new paragraph (d), which authorizes a public agency to designate another IEP team member as the public agency representative, provided the criteria in § 300.344(a)(4) are satisfied.

Comment: Many commenters emphasized the need to link the IEP and evaluation processes to ensure that participants on the IEP team were knowledgeable about the deliberations during the evaluation process and eligibility determination. Some commenters believed that the language about interpretation of evaluation results needs to be modified to specify that the individual in this capacity had contributed to the evaluation process. Many commenters requested that the regulation should specify that the initial IEP team must include a member of the eligibility team who is qualified to interpret the instructional implications of the evaluation results. Some commenters favored having such an individual present at all IEP meetings.

Discussion: Section 300.344(a)(5) essentially reflects the statutory requirement at section 614(d)(1)(B)(v), which requires the participation of an individual who is knowledgeable about the instructional implications of evaluation results, who may be another member of the IEP team. No further clarification should be provided since the statute specifically affords public agencies the flexibility to select another member of the IEP team to fulfill the requirement of § 300.344(a)(5), provided that individual is knowledgeable about the instructional implications of evaluation results.

Although commenters requested that the regulation be amended to require the participation of a member of the eligibility team who is knowledgeable about evaluation results to fulfill the requirement of § 300.344(a)(5), there is no statutory authority to impose such a requirement, either for initial or subsequent IEP meetings. However, it is expected that public agencies will find it helpful to have members of the eligibility team as IEP team members for initial and subsequent meetings to develop a child's IEP.

Changes: None.

Comment: Numerous comments were received regarding the participation of related services personnel at IEP meetings. Some commenters believed that any time a child is receiving a related service, or whenever a related service is reflected in the child's goals and objectives, the relevant related services personnel must attend the IEP meeting. Other commenters requested that the clarification in Appendix A regarding related services personnel who have special knowledge and expertise regarding the child be included in the regulations as well.

Many commenters requested a regulatory change to specify that related services personnel must attend IEP meetings, if appropriate, and need not be invited by the LEA. Other commenters recommended that to assist parents, clarification should be provided that related services personnel and the parents always must be notified of the IEP meeting whenever the child's need for a related service is being discussed. Other commenters recommended that § 300.344(a)(6) be changed to other individuals with special knowledge and expertise regarding the child, the child's disability and unique needs, and that criteria for attending the IEP meeting should include persons who can contribute to the quality of the final document.

Many commenters recommended that the regulations specify which related services personnel must attend IEP meetings. Several commenters recommended that IEP teams always must include school psychologists who are knowledgeable about clinical testing administration, particularly when evaluation results are being used to determine IEP goals, behavior impedes learning, reevaluations are required or are being determined, and functional behavioral assessments and reviews of behavioral interventions are necessary.

A number of comments were received regarding making the school nurse or other qualified provider of school health services a required participant on the IEP team. Some commenters limited this recommendation to situations in which the child has medical concerns or specialized health needs, and urged the participation of these individuals to the greatest extent practical, and when appropriate on the IEP team.

Many commenters were concerned that paragraph (a)(6) of this section was too restrictive, because it (1) could prevent parents from bringing support personnel, representatives of PTIs and other parent organizations, and other advocates to their child's IEP meetings, and (2) could place an unreasonable burden on the parent to prove the individual's "special knowledge or expertise" regarding their child.

Several commenters requested that the regulations list the conditions under which speech-language pathologists and audiologists will or may serve on the IEP team. Some commenters recommended that the regulations be amended to make the participation of the speech-language pathologist at the IEP meeting mandatory, while other commenters suggested that the number of individuals required to be on IEP teams for students for whom speech is the only special education service was excessive.

Some commenters recommended that the regulations specify that a person knowledgeable about the language and communication needs of deaf children must be present for their IEP meetings. Numerous commenters favored including in the regulation the portion of the note regarding the attendance of persons knowledgeable about positive behavior interventions and strategies at IEP meetings, if the student's behavior impedes the learning of the student or others. Some of these commenters recommended that the reference be changed to a person trained in the design and use of effective positive behavior support strategies.

Several comments were received regarding an attorney's participation at IEP meetings, and a recommendation was made that the discussion regarding the attorney's role at IEP meetings in Appendix A should be incorporated into the regulations. Another commenter recommended that the regulation should state that attorneys should never be in attendance at IEP meetings unless such a meeting is convened as a result of an administrative proceeding or judicial review. Other commenters suggested that adults with disabilities should be required members of the IEP team.

Discussion: Section 300.344(a)(6) adopts verbatim the statutory language at section 614(d)(1)(B)(vi) of the Act. Under this section, parents and public agencies have the discretion to bring to IEP meetings as IEP team members other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate. Under this statutory provision, the parent's and public agency's right to bring other individuals to the IEP meeting at their discretion must be exercised in a manner that ensures that all members of the IEP team have the knowledge or special expertise regarding the child to contribute meaningfully to the IEP team.

Individuals with knowledge about the child could include neighbors or friends of the parents, or advocates, who, in the judgement of the parents, are able to advise or assist them at the meeting. Individuals with special expertise could include professionals in evaluation or special education and related services who have been directly involved with the child, as well as those who do not know the child personally, but who have expertise in (for example) an instructional method or procedure, or in the provision of a related service that the parents or agency believe can be of assistance in developing an appropriate IEP for the child.

There is no need to make the participation of school nurses on the IEP team mandatory, as requested by commenters. As providers of the related service "school health services," their participation would be subject to the requirements of this section, and they could be members of the IEP team at the discretion of the parents or public agency, provided that they possess the requisite knowledge and special expertise regarding the child. The same is true of providers of speech-language and audiology services and individuals knowledgeable about the communication needs of students who are deaf or hard of hearing. In the case of a child whose behavior impedes the learning of the child or that of others, the public agency is encouraged to have a person with special expertise in positive behavior interventions and strategies on the IEP team at the IEP meeting.

Individuals such as representatives of PTIs may, at the parent's discretion, serve as members of the IEP team, provided they possess the requisite knowledge or expertise regarding the child.

Regarding attorneys participation at IEP meetings, it is important to note that a new statutory provision at section 615(i)(3)(D)(ii) provides that attorneys' fees may not be awarded for an IEP team meeting unless the meeting is convened as the result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation conducted prior to initiating a due process hearing under the Act. Issues raised related to attorneys' fees regarding IEP meetings are also addressed under § 300.513 of this attachment and in Appendix A.

It is not necessary to require the participation of adults with disabilities on the IEP team. As is true of other related services personnel, as well as other individuals selected as IEP team members at the parent's or agency's discretion, an adult with a disability could be a member of an IEP team at the parent's or public agency's discretion if that individual possesses the requisite knowledge and expertise regarding the child.

Changes: A new § 300.344(c) has been added to clarify that "The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section shall be made by the parents or public agency who invited the individual to be a member of the IEP team."

Comment: Commenters recommended that the word "appropriate" be deleted from § 300.344(a)(7), since a student always should be permitted to be at his or her IEP meeting, and that students eighteen years of age and older always should be considered members of the IEP team.

Commenters also recommended that language be added to the regulation to clarify that students under age 14 be included on the IEP team on an as-appropriate basis, and that students 14 and older be included as members of the team. Other commenters recommended clarification that the decision as to when it is "appropriate" for a child to attend his or her IEP meeting rests with the child and his or her parents.

Other commenters expressed a concern that students could be coerced into accepting instructional plans and that the IEP provisions should be amended to require that an advocate employed by the LEA must be present at every consultation involving teachers and students regarding IEP or implementation.

Discussion: Section 300.344(a)(7) of these regulations adopts verbatim the statutory requirement at section 614(d)(1)(B)(vii) of the Act regarding the child's participation as a member of his or her IEP team, as appropriate. Consistent with this statutory requirement, public agencies must invite students to attend IEP meetings in appropriate situations.

No regulatory change deleting the reference to "if appropriate" should be made, as requested by commenters, since to do so would alter the explicit statutory provision limiting the student's participation in IEP meetings to appropriate situations. However, if a purpose of the meeting will be the consideration of a student's transition services needs or needed transition services or both, § 300.344(b)(1) of these regulations would provide that the student must be invited to attend, because it is important to afford students an opportunity to participate and have a voice in planning for their transition from school to post-school activities, including postsecondary education and employment.

The change requested by commenters regarding the participation of a student over eighteen years of age as a member of their IEP team should not be made. Even if, under section 615(m) of the Act, all rights accorded parents under Part B transfer to students who have reached the age of majority under State law, ages of majority differ among States, and not all States regard age eighteen as the age at which parental rights transfer to children. In addition, under section 615(m) of the Act, there are circumstances in which parental rights accorded under Part B may not be transferred, even in a State that transfers rights at the State age of majority.

No change should be made regarding the commenters' concerns that students would be coerced into accepting instructional plans. It would be more appropriate to address these implementation issues at the State and local levels.

Changes: None.

Comment: Commenters requested that this section be revised to require SEAs and LEAs to enter into interagency agreements with non-school agencies that include participation by non-school agencies in transition meetings. Other suggestions made by commenters were that a statement be added to the regulations to require the attendance of an advocate or staff member from an independent living center and a transition coordinator at an IEP meeting whenever transition services are discussed. Other commenters requested additional information about boundaries and parameters for enlisting the involvement of other agency personnel in transition meetings.

Some commenters suggested that not only the public agency should have the ability to invite representatives of other agencies, but so should the parents. If a student is unable to attend an IEP meeting, other commenters asked what steps will be taken to ensure that the student's preferences and interests are being considered, especially if transition services are being discussed.

Discussion: Section 300.344(b)(1) of these regulations would require that a student of any age be invited to an IEP meeting if a purpose of the meeting is to meet a requirement of § 300.347(b)(1) (transition services) of these regulations. If the student cannot attend, the public agency must take whatever steps are necessary to ensure that the student's preferences and interests are being considered. No further clarification should be provided since these steps necessarily will vary based on a variety of factors, including the needs of the student.

There is no need for clarification regarding interagency agreements, since § 300.142 of these regulations already contains a requirement that agreements be in place between educational and noneducational public agencies to govern the provision and financing of all required services under these regulations, including transition services. There is no need to require the participation of advocates and transition coordinators at IEP meetings at which transition services needs or the statement of needed transition services is being discussed.

Changes: None.

Parent participation (§ 300.345)

Comment: A number of comments were received on the notice requirement in § 300.345(a), including comments requesting that (1) the regulations require that the notice be in a format and in language that is usable by parents; (2) because of the prior written notice requirement in the statute, public agencies should not have the option to provide verbal notice (i.e, by telephone); (3) LEAs generally should not be allowed to reject a parent's proposal for a time and place of the meeting, and meetings should be held at times that accommodate parents' work schedules; (4) the term "early enough" in § 300.345(a)(1) be replaced with a specific number of days; and (5) a draft IEP be given to parents not less than 10 days before the meeting.

Discussion: The "notice" requirement in § 300.345(a) of these final regulations implements provisions under prior regulations that were not changed by the IDEA Amendments of 1997, and, therefore, does not need to be revised with respect to the comments received. This requirement is a long-standing provision that is intended mainly to inform parents about the IEP meeting and provide them with relevant information about it (e.g., the purpose, time, and place of the meeting, and who will be in attendance). The requirement is not the same as the prior notice provision in § 300.503 (which requires written notice to parents whenever the public agency proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child).

In implementing § 300.345(a), some LEAs elect to contact parents by telephone or to send less formal notes about IEP meeting arrangements than would be required under § 300.503. These approaches are consistent with the long-standing regulatory requirement. With respect to § 300.345(a)(1) (i.e., notifying parents early enough of the meeting to ensure that they will have an opportunity to attend), there is no information to justify replacing the term "early enough" with a specified timeline. Because communicating with parents about IEP meeting arrangements is generally a less formal process than the procedures required by certain other provisions in this part, the use of timelines could have a negative effect.

The key factor in § 300.345(a) is that public agencies effectively communicate with parents about the up-coming IEP meeting, and attempt to arrange a mutually agreed upon time and place for the meeting. This process should accommodate the parents' work schedules to ensure that one or both parents are afforded the opportunity to participate.

The commenter's request that the public agency provide parents with a copy of the IEP 10 days before the meeting is inconsistent with the requirements of this part, which requires that the IEP be developed at the IEP meeting. However, to the extent that preliminary information is available in the agency that may affect discussions and decisions at the meeting related to their child's IEP, it is expected that the information would be provided to the parents sufficiently in advance of the meeting so that they can participate meaningfully in those discussions and decisions on an equal footing with other members of the IEP team. It is not necessary to set out a specific timeline for this information to be provided.

Changes: None.

Comment: A number of comments were received requesting that the first sentence of the note following § 300.345 (related to informing parents of their right to bring other people to the IEP meeting) be added to the regulation, and specifically to § 300.345(b) to ensure that this would be a specific requirement. Other commenters recommended deleting the note, stating that it is misleading, and will confuse parents and school staff and lead to unneeded difficulties.

Discussion: It is important for parents of children with disabilities to be aware that, under the provisions of § 300.344(a)(6) and (c), other individuals may be included on their child's IEP team, provided that the individuals have knowledge or special expertise regarding the child (see discussion under § 300.344 of this analysis). To ensure that parents know about those provisions, public agencies should be required to include information about the provisions in the notice of IEP meetings specified under § 300.345(a)(1) and (b)(1)(ii).

Changes: Section 300.345(b) has been amended to provide that the notice required under § 300.345(b) must "Inform the parents of the provisions in § 300.344(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child)."

Comment: A few comments were received on § 300.345(d) (related to holding an IEP meeting without the parents if the LEA is unable to convince them to participate). The commenters stated that the term "convince" should be replaced because it connotes an adversarial situation between the LEA and the parents, and suggested other terms. Some commenters requested that § 300.345(d)(3) (related to visits to a parent's home or place of employment) be deleted, stating (for example) that such a provision is overly intrusive, invasive, and could anger employers, and could cause some parents to be negatively impacted or insulted; and that the remaining methods in § 300.345(d)(3) are sufficient.

Another commenter suggested replacing the language in this paragraph with language that would require LEAs to demonstrate what they have done in attempting to involve parents.

Discussion: Section 300.345(d) is a longstanding provision that is intended to enable a public agency to proceed to conduct an IEP meeting if neither parent elects to attend, after repeated attempts by the public agency to ensure their participation. In administering and monitoring the provisions of this part over the past 22 years, few, if any, questions or concerns have been identified, or raised, with respect to the implementation of § 300.345(d), and there is no information to justify amending the paragraph at this time, either with respect to the word "convince" or the reference to maintaining records of efforts to involve the parents.

The regulation makes it clear that paragraphs (d)(1) through (d)(3) of this section are examples of what a public agency "may do" to maintain a record of its attempts to arrange a mutually agreed on time and place for conducting an IEP meeting. Public agencies are not required to go to the parent's place of employment to attempt to seek the parents' involvement in their child's IEP; and it is expected that a public agency would pursue that option very judiciously. However, there may be situations in which the agency believes that it is important to do so because it is otherwise unable to contact the parent. Implementation of this specific provision is left to the discretion of each public agency. In any case in which the agency is unable to contact the parents or otherwise ensure their participation, § 300.345(d) sets out options that the agency may elect to follow.

Changes: None.

Comment: Several commenters recommended that § 300.345(f) be amended to delete the term "on request" from the statement, so that parents are given a copy of the IEP without having to ask for it. One commenter requested that the copy be given within 5 days of the meeting.

Discussion: The new statute has given parents a more active voice in the education of their children with disabilities than existed under prior law. Because of the role parents play in the development, review, and revision of their child's IEP, it is appropriate to amend the regulation to require that each public agency must give the parents a copy of their child's IEP at no cost to the parents.

Changes: Section 300.345(f) has been amended consistent with the above discussion.

Development, Review, and Revision of IEP (§ 300.346)

Comment: A few comments were received on § 300.346(a)(1). Commenters recommended that (1) examples be added related to the strengths of the child and the concerns of the parents for enhancing the child's education; (2) the IEP team also consider the child's performance results on any State or district-wide assessments, in addition to the results of the initial or most recent evaluation of the child; and (3) the term "consider" be replaced with "examine and address;" or with "incorporate," to ensure that the IEP team incorporates the listed items into a child's IEP, rather than simply considering them.

While some commenters recommended that Note 1 be retained, other commenters recommended that the clarification in the note either be included in the text of the regulation or deleted in its entirety. One of the concerns expressed by commenters was that in considering special factors, the statement in Note 1 concerning review of valid information data, as appropriate, sets up a demand of separate or more expansive evaluation procedures for special consideration.

Discussion: Section 300.346(a)(1) adopts the statutory requirements related to considering the strengths of the child and the concerns of the parents. No examples regarding this provision have been incorporated into these final regulations, since these determinations would differ for each student, based on a variety of unique factors in light of the abilities and needs of the parents and children involved. Because the requirement to "consider" the strengths of the child and the concerns of the parent, as well as the special factors, is statutory, a word other than "consider" should not be substituted. The requirements in paragraph (a)(1) and (a)(2) of this section impose an affirmative obligation on the IEP team to ensure that the child's IEP reflects those considerations.

Paragraph (c) of this section also makes clear that if the IEP team determines, through consideration of special factors, that a child requires a particular service, intervention, or program modification, a statement to this effect must be included in the child's IEP. Therefore, no further clarification is necessary. Because the requirements in § 300.346(a) are evident from the text of this regulation, there is no need to retain Note 1 to this section of the NPRM in these final regulations.

Section 300.346(a)(1)(ii) also requires consideration of the results of the initial or most recent evaluation of the child, and this consideration must include, as appropriate, a review of valid evaluation data and the observed needs of the child resulting from the evaluation process. Because Pub. L. 105-17 strengthens collaboration between the IEP and evaluation processes, it is expected that this consideration will occur, as appropriate, through examination of existing evaluation data. Therefore, the commenters' concern that separate or expansive evaluation procedures would be required is not warranted.

The commenters' suggestion regarding the IEP team's consideration of the child's performance results on any State and district-wide assessment programs is consistent with the emphasis in the Act on the importance of ensuring that children with disabilities participate in the general curriculum and are expected to meet high achievement standards. Effective IEP development is central to helping these children meet these high standards. Section 612(a)(17) of the Act and § 300.138 of these regulations require, as conditions for receipt of IDEA funds, that States ensure that children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations where necessary, and must report the performance results of these children on such assessments. Therefore, § 300.346(a)(1) should be amended by adding paragraph (iii) to require that in considering the results of the initial or most recent evaluation of the child, the IEP team also consider, as appropriate, the results of the child's performance on any general State or district-wide assessment programs.

Changes: Section 300.346(a)(1) has been amended by adding paragraph (iii) to provide that, in considering the child's initial or most recent evaluation, the IEP team also consider, as appropriate, the results of the child's performance on any general State or district-wide assessment programs. Note 1 to this section of the NPRM has been removed.

Comment: Numerous comments were received on § 300.346(a)(2) (i.e., consideration of special factors). With respect to the factor under paragraph (a)(2)(i), in the case of a child whose behavior impedes his or her learning or that of others, commenters requested that (1) the term "if appropriate" be deleted because it will be used only for those children exhibiting dangerous behavior; (2) a note be added to state that consideration should be given to whether the behavior that impedes learning is due to frustration over a lack of services; (3) the IEP team also consider behavior exhibited both in and outside the school, and behavior that must be addressed to sustain in-school learning; (4) aversive behavior management strategies are banned under these regulations; (5) a child not be subjected to physical restraints or interventions unless agreed to by the child's parent and teacher; and (6) a plan between the parent and teacher be required to specify what disciplinary actions would occur if a child violated his or her behavioral intervention plan.

Discussion: Paragraph (a)(2) of this section (relating to consideration of special factors) implements the new statutory requirement in section 614(d)(3)(B) of the Act. It should be emphasized that, under prior law, IEP teams were required to consider these special factors in situations where such consideration was necessary to ensure the provision of FAPE to a particular child with a disability. Therefore, this new statutory provision makes explicit what was inherent in each child's entitlement to FAPE under prior law.

Paragraph (a)(2)(i) of this section adopts the statutory requirement at section 614(d)(3)(B)(i) of the Act, that, in the case of a child whose behavior impedes his or her learning or that of others, the IEP team consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. The commenters' concern that the retention of the words "if appropriate" would mean that the provision would be applied only in situations where a child exhibited dangerous behavior seems to ignore that school officials have powerful incentives to implement positive behavioral interventions, strategies and supports whenever behavior interferes with the important teaching and learning activities of school. Since the word "strategies" is used two times in the statutory provision, contrary to commenters' suggestion, the word strategies should not be deleted the second time it appears in this section.

Although the commenters' suggestions that behavior may be exhibited that impedes learning due to a frustration over lack of services and that the IEP team needs to examine in and out-of-school behavior to develop interventions to sustain learning are extremely important, no clarification should be provided in these regulations, to avoid overregulation in this area. It would be more appropriate to provide technical assistance on § 300.346(a)(2)(i) on an as needed basis, instead of developing general rules to which numerous exceptions would most likely apply. The Department funds a number of research efforts in this area, as well as technical assistance providers. Of course, in appropriate cases it might be helpful to all parties for the IEP to identify the circumstances or behaviors of others that may result in inappropriate behaviors by the child.

Regarding what behavioral interventions and strategies can be used, and whether the use of aversive behavioral management strategies is prohibited under these regulations, the needs of the individual child are of paramount importance in determining the behavioral management strategies that are appropriate for inclusion in the child's IEP. In making these determinations, the primary focus must be on ensuring that the behavioral management strategies in the child's IEP reflect the Act's requirement for the use of positive behavioral interventions and strategies to address the behavior that impedes the learning of the child or that of other children.

It would not be appropriate for these regulations to require a specific plan between the teacher and parent, as described by commenters, that would specify consequences for a student's failure to comply with a behavioral intervention plan. A child's need for this type of plan, and the specific elements of that plan, would vary depending on the child and the behavior involved. Of course, in appropriate circumstances, the IEP team which includes the child's parents, might agree upon a behavioral intervention plan that included specific regular or alternative disciplinary measures that would result from particular infractions of school rules.

Parents who disagree with the behavioral interventions and strategies included in their child's IEP can utilize the Act's procedural safeguard requirements, which afford them the right to request an impartial due process hearing under § 300.507 and the option to use mediation under § 300.506 of these regulations.

Changes: None.

Comment: Numerous comments were received on § 300.346(a)(2)(ii) and Note 3 (factors related to a child with limited English proficiency (LEP). Commenters recommended changes in the regulation, such as: (1) replacing "IEP" with "disability" in § 300.346(a)(2)(ii); (2) clarifying that the consideration include how the child's level of English language proficiency affects the provision of special education and related services needed to receive FAPE, and how the child will be provided meaningful and full participation in the general curriculum, including through the use of alternative language services; (3) clarifying that special education and related services be provided in the language identified by the school district, with appropriate support services; (4) clarifying whether English language tutoring is a related service that must be included in a child's IEP or part of the general curriculum; and (5) recognizing that second language acquisition might take precedence over the general curriculum.

A few commenters expressed support for Note 3, stating (for example) that it is helpful in recognizing that special education services may need to be provided in a language other than English. Other commenters requested that Note 3 be moved to the text of the regulation, or deleted in its entirety since it expands responsibilities under these regulations to requirements of Federal laws other than Part B.

Discussion: Section 300.346(a)(2)(ii) of these regulations adopts verbatim the statutory requirement at section 614(d)(3)(B)(ii) of the Act, that in the case of a child with limited English proficiency, the IEP team consider the language needs of the child as such needs relate to the child's IEP. Modifications to this paragraph that would involve changes to statutory language should not be made.

Issues such as the extent to which a LEP child with a disability receives instruction in English or the child's native language, the extent to which a LEP child with a disability can participate in the general curriculum, or whether English language tutoring is a service that must be included in a child's IEP, are determinations that must be made on an individual basis by the members of a child's IEP team.

In light of the general decision to remove all notes, Note 3 has been removed. However, in developing an IEP for a LEP child with a disability, it is particularly important that the IEP team consider how the child's level of English language proficiency affects the special education and related services that the child needs in order to receive FAPE, consistent with § 300.346(a)(2)(ii) and (c). Under Title VI of the Civil Rights Act of 1964, school districts are required to provide LEP children with alternative language services to enable them to acquire proficiency in English and to provide them with meaningful access to the content of the educational curriculum that is available to all students, including special education and related services.

A LEP child with a disability may require special education and related services for those aspects of the educational program which address the development of English language skills and other aspects of the child's educational program. For a LEP child with a disability, under paragraph (c) of this section, the IEP must address whether the special education and related services that the child needs will be provided in a language other than English.

Changes: Note 3 has been removed.

Comment: With respect to the special factor considered for a child who is blind or visually impaired, commenters requested that the regulation clarify that (1) Braille materials must be provided to students who are blind or visually impaired at the same time that their sighted peers receive the materials; (2) a child may not be denied Braille services on the basis that modified reading and writing media, other than Braille, are being provided; (3) when there is a disagreement about the use of Braille, Braille instruction must be provided until lawful procedures have culminated in a final decision; and (4) any child who meets the legal definition of blindness should be taught Braille.

Commenters also stated that other options besides Braille may be needed for certain students, as described in the "Policy Guidance on Educating Blind and Visually Impaired Students" (OSEP 96-4, dated 11-3-95), and requested that a note be added that includes much of the content of that document, or that a reference be made to that policy guidance paralleling Note 2 relating to students who are deaf or hard of hearing.

Discussion: Section 300.346(a)(2)(iii) of these final regulations adopts verbatim the statutory language at section 614(d)(3)(B)(iii) of the Act. Under this requirement, in the case of a child who is blind or visually impaired, the IEP team must make provision for instruction in Braille and the use of Braille, unless the IEP team determines, after the evaluations described in the statutory provision, that instruction in Braille or the use of Braille is not appropriate for the child. Changes to statutory language requested by commenters should not be made.

Contrary to a suggestion of commenters, a regulatory provision making it mandatory for Braille to be taught to every child who is legally blind would contravene the individually-oriented focus of the Act, as well as the statutory requirement that the IEP team must make individual determinations for each child who is blind or visually impaired based on relevant evaluation data. As explained in OSEP Memorandum 96-4, Policy Guidance on Educating Blind and Visually Impaired Students, the IEP team's determination as to whether a child who is blind or visually impaired receives instruction in Braille or the use of Braille cannot be based on factors such as availability of alternative reading media, such as large print, recorded materials, or computers with speech output.

Additionally, although these regulations do not specify that a child for whom Braille instruction is determined appropriate must receive Braille materials at the same time they are provided to their sighted peers, once the IEP team determines that a child requires instruction in Braille, such instruction, along with other aspects of the child's IEP, must be implemented as soon as possible following the child's IEP meeting, and in any case, without undue delay. If there is disagreement between the parents and school district over what constitutes an appropriate program for a child who is blind or visually impaired, when the IEP team has determined that instruction in Braille would not be appropriate for the child, the parents of the child would have the right to request a due process hearing and mediation. In addition, parents have available to them mediation and complaint resolution by which they can file a complaint with the SEA under the State complaint procedures in these regulations.

Although the LEA would not be required to provide instruction in Braille while the dispute is being resolved, the LEA would be required, both by Part B and Section 504, to ensure that the child receives instructional materials in an alternative medium to enable the child to participate in the LEA's program.

The OSEP Policy Guidance on Educating Blind and Visually Impaired students should not be included in these final regulations since many of the statutory and regulatory provisions cited in the policy guidance have been replaced by the requirements of Pub. L. 105-17. In some important respects, particularly with regard to consideration of instruction in Braille, Pub. L. 105-17 substantially revised the requirements of prior law. It also should be pointed out that Note 2 to this section of the NPRM, which contained a reference to corresponding policy guidance regarding educating deaf students, is being removed as a note, and pertinent references to that policy guidance are incorporated into the discussion of § 300.346(a)(2)(iv).

Changes: None.

Comment: With respect to considering the communication needs of the child and factors related to a child who is deaf or hard of hearing, commenters expressed support for Note 2 (related to policy guidance on Deaf Students Education Services that was published in the **Federal Register** in 1992), and requested that the entire statement be published as an attachment to these regulations. Some commenters favored deleting Note 2 because they objected to citation of policy guidance documents in the regulations without following applicable procedures in section 607(b) and (c) of the Act.

Commenters recommended adding to the regulations proposed definitions of the terms "direct communication," "the child's language," and "full range of needs," or adding clarifying language relating to those terms (e.g., that the child's primary language could be American Sign Language, and that the full range of needs includes social, emotional, and cultural needs).

Commenters also recommended (1) requiring that counselors of the deaf assess each deaf child's language and speech communication in spontaneous conversation at age 5, to determine whether the child has the skill to stay in an oral program or should be transferred to a program that uses sign language; (2) that the regulations make it clear that the communication needs of a deaf child are fundamental to the LRE decision; (3) that many deaf children need to be in an environment where they can communicate directly through a visual mode with those around them; and (4) that the IEP team document that it considered the language and communication needs of a hard of hearing child and how such needs will be met in the proposed placement.

A few commenters requested that children with cochlear implants be included with other deaf children in the structure of educational placements and language and communication needs, and that the IEP state what will be done to assist the child to best utilize the hearing acquired.

Some commenters requested adding children with deafness and blindness because they also have communication needs and require this consideration.

Discussion: Section 300.346(a)(2)(iv) of these regulations adopts verbatim the statutory requirement in section 614(d)(3)(B)(iv) of the Act that the IEP team consider the communication needs of the child, and, in the case of a child who is deaf or hard of hearing, those additional special factors relating to the child's language and communication needs. Additional guidance in the form of changes to the regulations requested by commenters should not be provided.

In the interest of not using notes in these final regulations, Note 2 to this section of the NPRM should be removed. It is important to emphasize that this policy guidance on Deaf Students Educational Services merely interprets existing statutory and regulatory requirements, and does not impose new requirements on the public. Nevertheless, LEAs are not relieved of their responsibilities to ensure that paragraph (a)(2)(iv) of this section is implemented consistent with the published policy guidance on Deaf Students Education Services, and that the full range of communication and related needs of deaf and hard of hearing students are appropriately addressed in evaluation, IEP, and placement decisions under these regulations.

The Senate and House Committee Reports on Pub. L. 105-17 reinforce this principle in their statements that "the IEP team should implement the [new statutory] provision in a manner consistent with the policy guidance entitled "Deaf Students Education Services" published in the **Federal Register** (57 FR 49274, October 30, 1992) by the Department." S. Rep. No. 105-17, p. 25., H.R. Rep. No. 105-95, p. 104 (1997). The Department fully expects LEAs to ensure that § 300.346(a)(2)(iv) of these regulations is implemented consistent with these statements.

Changes: Note 2 has been removed.

Comment: With respect to considering whether a child needs assistive technology (AT), some commenters stated that if AT devices or services are recommended and not provided, the IEP must include a statement to that effect and the basis on which the determination was made. Other commenters stated that having to document that such devices and services were considered is an unnecessary paperwork burden.

Commenters also recommended (1) requiring that decisions about the need for AT are made early enough so that they are in effect by the beginning of the school year; (2) clarifying that if an AT device is needed, the child has the right to take it home; (3) adding clarification of liability issues (e.g., where a child uses a family owned device at school and other waiver of liability issues); and (4) adding a note that AT can have a significantly positive effect on the attainment of annual goals and participation in the general curriculum.

Discussion: Section 300.346(a)(2)(v) of these regulations adopts verbatim the new statutory requirement at section 614(d)(b)(3)(v) of the Act, making it mandatory for the IEP team to consider each child's AT needs. This statutory provision reinforces the requirement in § 300.308 of these regulations that if an IEP team determines that a disabled child requires an AT device or service in order to receive FAPE, the required AT must be provided at no cost to the parents. In all instances, the IEP team must determine whether an individual disabled child should receive AT, and if so, the nature and extent of AT provided to the child.

Because in many situations, parents were reporting that LEAs were not properly considering their children's AT needs on an individual basis, this new provision should ensure that each child's IEP team considers the child's need for AT. Since IEP teams must consider each child's need for AT on an individual basis, determinations regarding the provision of AT must be made when the child's IEP for the upcoming school year is finalized so that the AT can be implemented with that IEP at the beginning of the next school year.

In the interest of not adding paperwork burdens to these regulations, there is no additional requirement that LEAs document that the IEP team considered a child's AT needs, or considered a child's AT needs and determined that AT not be provided to the child. It is not necessary to add the clarification regarding the importance of reflecting a child's AT needs in IEP goals and objectives or in issues relating to the child's participation in the general curriculum.

All of needs identified through consideration of the special factors contained in paragraph (a)(2) of this section must be reflected in the contents of the child's IEP, including, as appropriate, the instructional program and services provided to the child, the annual goals, and the child's involvement in and progress in the general curriculum. In addition, individual consideration of a child's AT needs is essential to ensuring that the child's unique needs arising from his or her disability are appropriately addressed so that the child can be involved in and progress in the general curriculum.

Issues regarding whether AT devices or services can be used at home, and issues regarding liability for family-owned AT devices used at school are addressed either in discussions of §§ 300.5–300.6 or 300.308 of the attachment, and, as appropriate, are reflected in changes to those regulations.

Changes: None.

Comment: Commenters stated that, in light of the fact that IEP teams must consider special factors in five specific instances, and are responsible for significant decisions as a result of changes made by Pub. L. 105–17, a new paragraph (a)(3) should be added to § 300.346 to provide specific guidance to IEP teams (e.g., requiring that the teams draw upon information from a variety of sources, including teacher observation, input from parents, and other specified information). Other commenters requested that a new paragraph be added to § 300.346 to ensure that all children with disabilities receive the services in their IEPs and retain the rights and privileges included under the Act.

Discussion: While the concerns expressed by these commenters are extremely important, no regulatory changes should be made. Consideration of the five specific factors outlined in the statute and these regulations, of necessity, will require consideration of information from a variety of sources, and § 300.346(c) of these regulations also requires that such consideration be reflected in the contents of a child's IEP. In addition, it is not necessary to add a provision to clarify that all children with disabilities must receive services listed in their IEPs. This requirement is already reflected in § 300.350 of these regulations, which provides that each child with a disability must receive special education and related services in accordance with an IEP.

Changes: None.

Comment: A few comments were received on § 300.346(d)(2) (relating to the determination of supplementary aids and services, program modifications, and supports for school personnel, consistent with § 300.347(a)(3)). The commenters stated that (1) the term "supports for school personnel" focuses the need from the student to the staff, and recommended adding a note to narrow this provision, because it could be interpreted broadly by staff and have a negative effect on resources that are needed to directly meet student needs; (2) the provision may be used by teachers to block admission of children with disabilities to their class by demanding unreasonable supports; (3) additional guidance be provided, since this is the first time that the IEP has addressed needs not specific to the child; and (4) language be added indicating that the LEA and not the teacher should be the focus of responsibility in the provision of such supports.

Discussion: With respect to § 300.346(d)(2), including the statement relating to supports for school personnel, it is critical that those determinations are "consistent with § 300.347(a)(3)." Section 300.347(a)(3) makes clear that the focus of the supports is to assist the child to advance appropriately toward (for example) attaining the annual goals, and to be involved in and progress in the general education curriculum. Therefore, while certain supports for school staff may be provided (such as specific training in the effective integration of children with disabilities in regular classes), the ultimate focus of those supports to school personnel is to ensure the provision of FAPE to children with disabilities under Part B, their integration with nondisabled peers and their participation and involvement in the general curriculum, as appropriate. Consistent with the Act's emphasis on ensuring the provision of FAPE to children with disabilities, and, to the maximum extent appropriate, educating those children in regular classes with nondisabled children with appropriate supplementary aids and services, it is critical that at least one regular education teacher of the child be a member of the IEP team and provide input on appropriate supplementary aids and services, including program modifications and supports for school personnel. It also is essential that the child's teachers and other service providers who are not members of the IEP team are informed about the contents of the child's IEP, in whatever manner deemed appropriate by the public agency, so that the IEP is properly implemented by all school personnel.

Changes: None.

Content of IEP (§ 300.347)

Comment: A number of general comments were received relating to § 300.347. Some commenters expressed concerns that the IEP requirements were burdensome. A commenter requested that a sample IEP be provided in order to cut down on paperwork and keep the IEP to the essentials of Federal and State law. Commenters also (1) requested that a provision addressing assistive technology be added, as it is often not provided, and (2) stated that § 300.347 should contain a requirement that the IEP document be in a user-friendly format and written in language that can be understood by parents, and that the mandatory contents of IEPs include ESY services, if a child is eligible for such services, and necessary services that will be provided by another agency and the name of the provider.

Other commenters requested (1) documenting how special factors were considered; (2) clarifying the role of the regular education teacher in IEPs of children who are in self-contained, restrictive placement settings, or private placements; (3) providing the necessary flexibility to change how and where services are delivered to meet the child's changing needs; and (4) forbidding the practice of LEAs providing interim plans which promise that a full IEP will be developed at a later date—a device used by LEAs to avoid specifying what they will do for a child, so that the IEP can be discussed and litigated (if necessary) well before the start of a school year.

Discussion: In developing these final regulations, efforts have been made to ensure that the regulatory requirements related to the content of IEPs are consistent with the IDEA Amendments of 1997, and that no additional burden is added. The Department will explore the extent to which a sample IEP addressing the Federal requirements as part of a technical assistance effort, would be useful to parents and State and local administrators in developing IEPs that meet Federal, State, and local rules.

With respect to concerns about added burden, the provisions of § 300.347 are drawn directly from the statute. While the statute did add some new requirements regarding content, it also gave the flexibility to use benchmarks of progress as opposed to short term objectives, and to determine how to regularly report on a child's progress instead of the more burdensome objective criteria, evaluation procedures and schedules required under prior law.

Except for including, essentially verbatim, the statutory content requirements in the regulations, the format and specific language used in developing IEPs are matters left to the discretion of individual States, and, to the extent consistent with State requirements, individual LEAs within the States. In providing such discretion, the assumption is that each State and LEA would attempt to make the format and language of the IEP as understandable and meaningful for parents as possible. Within this general framework, IEP teams develop the specific detail that is necessary to address each child's individual needs.

The importance of assistive technology devices and services in meeting the special educational needs of children with disabilities is addressed in several sections of these regulations (e.g., §§ 300.5, 300.6, 300.308, and 300.346). The importance of ESY services and the requirements related to addressing the need for those services is included under § 300.309. Therefore, no additional provisions are warranted in this section.

With respect to the comment regarding the role of the regular education teacher, the IDEA Amendments of 1997 require that at least one regular education teacher of the child be a member of the child's IEP team if the child is or may be participating in the regular education environment.

The development of an interim IEP (or the use of a diagnostic placement, on a case-by-case basis) may be appropriate for an individual child with a disability if there is some question about the child's special education or related services needs. However, it would not be consistent with the requirements of this part for an LEA to adopt an across-the-board policy of developing interim IEPs for all children with disabilities. Clearly, in any case in which the IEP for a child with a disability does not seem to effectively address the needs of the child, the IEP team should be reconvened (at the request of the child's parent or teacher(s)) to reconsider the nature and scope of the IEP.

Changes: None.

Comment: A few comments were received related to the statement of the present levels of educational performance in the IEP (§ 300.347(a)(1)), including requesting that (1) the statement include the results of any independent assessment that has been done, and any reasons the LEA has for not accepting the assessment; and (2) the provision requiring a description of how the child's disability affects the child's involvement in the general curriculum be deleted. One commenter recommended that this requirement and the provision on goals and objectives in § 300.347(a)(2) be revised to address the concept of "meaningful" participation in the general curriculum. Commenters also requested that, in the requirements for a description of how a preschool child's disability affects the child's participation in appropriate activities, the term "appropriate activities" be clarified or examples given.

A number of comments were received regarding the "statement of measurable annual goals, including benchmarks or short-term objectives" (§ 300.347(a)(2)). Several commenters requested that the term "benchmarks" be defined or clarified or that a note be added to include examples, and that the term be distinguished from "short-term objectives." Other commenters requested that (1) the term "measurable" apply to short-term objectives and not to annual goals, (2) the regulation clarify if "measurable" means statements of the amount of progress expected; (3) a child's report card be used to report annual goals; and (4) a provision be added requiring the IEP team to be reconvened if the benchmarks indicate that the child is not making satisfactory progress.

Comments were received on § 300.347(a)(2)(i) (regarding enabling a child to be involved in and progress in the general curriculum), as follows: (1) make the provision clearer, including requiring that the LEA list, for each goal and objective, each obstacle to full, effective participation in the general curriculum, and justify use of the resource room instead of supports in the regular classroom, and (2) clarify what the expectations are for children with significant cognitive disorders.

Discussion: It is important that the statement of a child's present levels of educational performance be based on current, relevant information about the child, that is obtained from a variety of sources, including (1) the most recent reevaluation of the child under § 300.536, (2) assessment results from State and district-wide assessments, (3) inputs from the child's special and regular education teachers, and (4) information from the child's parents. (§ 300.346(a)(1)). If an independent educational evaluation has been conducted, the results of that evaluation also must be considered if it meets agency criteria for such evaluations. (§ 300.502(c)(1)).

Consideration of all of the information described above is inherent in the requirement that the IEP include "a statement of the present levels of educational performance." Therefore, it is not necessary to amend the regulation to address this requirement.

The provision in § 300.347(a)(1)(i) that requires a description of how a child's disability affects the child's involvement in the general curriculum (i.e., the same curriculum as for nondisabled children) is a statutory requirement and cannot be deleted. The requirement is important because it provides the basis for determining what accommodations the child needs in order to participate in the general curriculum to the maximum extent appropriate.

A basic assumption made in both the statute and these final regulations is that the programming and services for each "individual" child would be tailored to address the child's unique needs that impede the child's ability to make meaningful progress in the general curriculum. (As explained elsewhere in this attachment, the reference to the general curriculum in § 300.347(a)(2) has been modified to clarify that the general curriculum is the same curriculum for nondisabled children.)

With respect to preschool-aged children, the term "appropriate activities," as used in § 300.347(a)(1)(ii), includes activities that children of that chronological age engage in as part of a formal preschool program or in informal activities (e.g., coloring, pre-reading activities, sharing-time, play time, and listening to stories told or read by the parent or pre-school teacher). In order to recognize that for some preschool-aged children appropriate goals will be related to participation in appropriate activities, as these children are not of an age for which there is not a general curriculum for nondisabled children, a change should be made to § 300.347(a)(2).

A delineation and description of the difference between "benchmarks" and "short term objectives" is included in Appendix A.

Regarding the commenter's request that the LEA (1) list obstacles to the child's full, effective participation in the general curriculum, and (2) justify the use of a resource room instead of supports in the regular classroom, no further regulation will be provided. Parents are equal members of their child's IEP team, and can participate in the discussion about whether there are any obstacles to ensuring the child's full and effective participation in the general curriculum. In any case in which the parents are not satisfied with the outcome of the IEP meeting, they have avenues available to them under both the Act and regulations for redressing their concerns.

See comments and discussion in § 300.550 related to children with significant cognitive disorders.

Changes: Section 300.347(a)(2)(i) has been revised to clarify that "general curriculum" is the same curriculum as for nondisabled children and to recognize that a general curriculum is not available for all preschool-aged children.

Comment: With respect to the provision in § 300.347(a)(3) (related to describing services to be provided to a child, or on behalf of the child * * *), a few commenters requested clarification of the term "on behalf of the child." Commenters also recommended that, in the "statement of program modifications or supports for school personnel," the regulation clarify that "staff training" is one form of program support, and added that a necessary support service for staff can often be obtained more easily if it is identified as an IEP service.

A few commenters recommended that, in order to ensure full access to the general curriculum, § 300.347(a)(3)(ii) be amended to state that a child's involvement and progress in the general curriculum be "to the maximum extent appropriate to the needs of the child." Other commenters requested that the provision in § 300.347(a)(3)(ii) (related to a child's participation in extracurricular activities) be deleted because it is inconsistent with Part B. Commenters also requested that the regulations clarify that participation in extracurricular activities is not a part of the child's educational program, and that such participation is subject to the same rules as other children.

With respect to § 300.347(a)(4) (an explanation of the extent to which the child will not participate with nondisabled children), a few commenters recommended that the provision be deleted, or that it be stated in positive terms (extent to which the child "will" participate with nondisabled children). Commenters also stated that documenting what will not happen is burdensome paperwork.

Discussion: As used in § 300.347(a)(3), the term "on behalf of the child" includes, among other things, services that are provided to the parents or teachers of a child with a disability to help them to more effectively work with the child. For example, as used in the definition of "related services" under § 300.24, the term " 'parent counseling and training' means (i) Assisting parents in understanding the special needs of their child * * * and (iii) Helping [them] to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP."

Supports for school personnel could also include special training for a child's teacher. However, in order for the training to meet the requirements of § 300.347(a)(3), it would normally be targeted directly on assisting the teacher to meet a unique and specific need of the child, and not simply to participate in an inservice training program that is generally available within a public agency.

In order to ensure full access to the general curriculum, it is not necessary to amend § 300.347(a)(3)(ii) to clarify that a child's involvement and progress in the general curriculum must be "to the maximum extent appropriate to needs of the child." The individualization of the IEP process, together with the new requirements related to the general curriculum, should ensure that such involvement and progress is "to the maximum extent appropriate to the needs of the child."

The provision in § 300.347(a)(3)(ii) related to participation in "extracurricular and other nonacademic activities" is statutory.

The provision in § 300.347(a)(4) (that requires a statement of the extent to which a child with disabilities will *not* participate with nondisabled children) is also a statutory requirement and cannot be deleted. The basic principle underlying this requirement is that children with disabilities will be educated in the regular education environment along with their nondisabled peers, and that these children are only removed from that environment if it is determined that they cannot be appropriately served in the regular education environment, even with the use of supplementary aids and services.

This new provision is designed to ensure that each IEP team carefully considers the extent to which a child can be educated with his or her nondisabled peers; and if the team determines that the child cannot participate full time with nondisabled children in the regular classroom and in the other activities described in § 300.347(a)(3)(ii), the IEP must include a statement that explains why full participation is not possible.

If (for example) a child needs speech-language pathology services in a separate setting two to three times a week, but will otherwise spend full time with nondisabled children in the activities described in § 300.347(a)(4), the "explanation" would require only the statement described in the preceding sentence. A similar explanation would be required for any other child with a disability who, in the judgement of the IEP team, will not participate on a full time basis with nondisabled children in the regular class. Thus, while the IEP needs to clearly address this situation, the required explanation does not have to be burdensome.

Changes: None.

Comment: A few comments were received on § 300.347(a)(5) (related to State or district-wide assessments), including requesting that: (1) the regulations clarify that if the individual modifications necessary for a child to participate in the assessment are not known at the time of the IEP meeting, a subsequent meeting be required to make this determination, as long as the decision is made before the assessment is conducted; and (2) an alternate assessment not be construed as an exemption and a separate assessment system, but, rather, that the provision in § 300.347(a)(5)(ii)(B) be amended to require a statement of how the child will be included in the State or district-wide assessment program with an alternative assessment.

Discussion: If the individual modifications necessary for a child to participate in the assessment are not known at the time of the IEP meeting, it would be necessary for a subsequent meeting to be conducted early enough to ensure that any necessary modifications are in place at the time the assessment is administered. It is not necessary, however, to add a regulation to address this matter.

The IDEA Amendments of 1997 require that all children with disabilities be included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. (§ 300.138). In some cases, alternate assessments may be necessary, depending on the needs of the child, and not the category or severity of the child's disability.

Changes: None.

Comment: Several comments were received on § 300.347(a)(6) (related to the projected date for beginning services and modifications and their anticipated frequency, location, and duration). A few commenters requested that the term "anticipated" be defined so that it does not diminish an LEA's obligation to provide services. Some commenters requested that the term "location" be defined as the placement on the continuum and not the exact building where the IEP service is to be provided, especially if the service is not available in the LEA and must be provided via contract. Other commenters similarly stated that a note be added clarifying that "location" means the general setting in which the services will be provided and not a particular school or facility.

Discussion: Use of the term "anticipated" to diminish the agency's obligation to provide services would be inconsistent with the requirements of this part. Moreover, a public agency could not alter the basic nature and scope of the child's IEP without reconvening the child's IEP team.

The "location" of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?

Changes: None.

Comment: With respect to § 300.347(a)(7) (related to a statement of how a child's progress toward annual goals will be measured and reported), commenters requested that a definition of "progress report" be added; and stated that the provision is burdensome, and should be changed to require that report cards for children with disabilities contain information about the child's progress in meeting annual goals.

Commenters also requested that the regulations (1) clarify the manner and frequency in which parents are kept informed of their child's progress; (2) clarify the extent to which this requirement can be met in writing as opposed to conducting an IEP meeting; (3) require a detailed written narrative report of how a child is progressing toward meeting IEP objectives instead of using a grade, because a grade is related to the system and not the child, and gives no indication of what is right or wrong; and (4) include a provision requiring action to be taken if satisfactory progress in not being made.

Discussion: It is not appropriate or necessary to include a definition of "progress report" because that term is not used in either the statute or these final regulations. The provision in § 300.347(a)(7)(ii) is incorporated verbatim from the statute. No additional burden was added by the NPRM or these final regulations.

Under the statute and regulations, the manner in which that requirement is implemented is left to the discretion of each State. Therefore, a State could elect to ensure that report cards used for children with disabilities contain information about each child's progress toward meeting the child's IEP goals, as suggested by commenters, but would not be required to do so.

With respect to the frequency of reporting, the statute and regulations are both clear that the parents of a child with a disability must be regularly informed of their child's progress at least as often as parents are informed of their nondisabled children's progress.

Requiring a "detailed written narrative" of how a child is progressing toward meeting the IEP objectives, as suggested by a commenter, could add an unnecessary burden. However, the commenter's concern about using a grade to designate a child's progress in meeting the IEP objectives in some cases may be valid because a grade does not always lend itself to sufficiently describing progress toward the annual goals. The statute and regulations make clear that a written report is sufficient, although in some instances, an agency may decide that a meeting with the parents (which does not have to be an IEP meeting) would be a more effective means of communication.

The agency must ensure that whatever method, or combination of methods, is adopted provides sufficient information to enable parents to be informed of (1) their child's progress toward the annual goals, and (2) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Generally, reports to parents are not expected to be lengthy or burdensome. The statement of the annual goals and short term objectives or benchmarks in the child's current IEP could serve as the base document for briefly describing the child's progress.

Changes: None.

Comment: A number of comments were received on Notes 2 through 5 (which focus on matters related to the child's participation in the general curriculum, the expected impact on the length and scope of the IEP from such participation and from discussing teaching methodologies, and reporting to parents) are addressed in the following sections of this analysis. Some commenters requested that all notes be deleted. Other commenters requested that Notes 2, 3, and 4 be incorporated into the regulations. A few commenters recommended that for Notes 2 and 3, the regulations define the terms "adaptations," "modifications," "accommodations," and "adjustments."

Regarding Note 3, some of the commenters recommended deleting the idea that the general curriculum is not intended to significantly increase the size of the IEP. One commenter recommended replacing the word "accessing" with "fully participating in" the general curriculum. The commenter stated that the language in the note (from the House Committee Report) could be used by LEAs as a basis for limiting the use of the IEP as a tool for enabling children with disabilities to participate fully in the general curriculum. Other commenters recommended that Note 3 be deleted.

Discussion: The IDEA Amendments of 1997 emphasize providing greater access by children with disabilities to the general curriculum and to educational reforms, as an effective means of ensuring better results for these children. Both the Senate and House Committee Reports on Pub. L. 105–17 state that:

> The Committee wishes to emphasize that, once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general education curriculum should be strengthened. The majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications. This provision is intended to ensure that children's special education and related services are in addition to and are affected by the general education curriculum, not separate from it. (S. Rep. No. 105–17, p. 20; H.R. Rep. No. 105–95, p. 99 (1997))

These are important principles to keep in mind when implementing the new IEP requirements. However, in light of the general decision to remove notes from the final regulation, Note 2 would be removed.

The concepts in the committee reports cited in Note 3 also are valid. The new focus of the IEP is intended to address the accommodations and adjustments necessary to enable children with disabilities to be able to participate in the general curriculum to the maximum extent appropriate. Although the annual goals and short term objectives (and the service accommodations described above) would be basic components of the IEP, it would not be appropriate for the IEP to include specific details related to the general curriculum itself (and to daily lesson plans).

Generally, the overall length of the IEP should not be greatly affected by including relevant information about the accommodations and adjustments needed by the child, along with the other required information. But the IEP should provide sufficient information necessary to enable parents, regular education teachers, and all service providers to understand what is required to effectively implement its provisions. However, consistent with the general decision made with respect to notes, Notes 2 and 3 would be deleted.

Because Note 3 has been deleted, it is not necessary to replace the word "accessing" with "fully participating in" the general curriculum. Clearly, the intent of the IDEA is full participation of each child with a disability in the general curriculum to the maximum extent appropriate to the needs of child; and the IDEA Amendments of 1997, as reflected in these final regulations, have given greater emphasis to that intent.

It is not necessary to include a regulatory definition of the terms "adaptations," "modifications," "accommodations," and "adjustments." The terms are essentially self-explanatory, and may overlap to some extent.

Certain changes may need to be made in a regular education classroom to make it possible for a child with a disability to participate more fully and effectively in general curricular activities that take place in that room. These changes could involve (for example) providing a special seating arrangement for a child; using professional or student "tutors" to help the child; raising the level of a child's desk; allowing the child more time to complete a given assignment; working with the parents to help the child at home; and providing extra help to the child before or after the beginning of the school day.

"Modifications" or "accommodations" could involve providing a particular assistive technology device for the child, or modifying the child's desk in some manner that facilitates the child's ability to write or hold books, etc.

Changes: Notes 2 and 3 have been removed.

Comment: Several comments were received on Note 4 (related to teaching and related services methodologies). A few commenters expressed support for Note 4, and stated that the note should be added to the regulations. Other commenters requested that the note be deleted. Some of these commenters stated that, in some instances, it may be appropriate to include teaching methods and approaches in the IEP, and added that when methodologies differ significantly, one approach may be appropriate while others are inappropriate, based on the unique needs of each individual child. Other commenters pointed out that methodologies are an inherent part of the definition of special education, and it would be inconsistent with the definition to not include them in the IEP.

With respect to Note 5 (i.e., that the reporting provision in § 300.347(a)(7)(ii), related to the child's progress on the annual goals, is intended to be in addition to regular reporting for all children), a few commenters expressed appreciation for the provision. Some commenters stated that the note be deleted. Other commenters recommended that the note either be deleted, or changed to state that the provision in § 300.347(a)(7)(ii) may be incorporated as part of the regular reporting to all parents.

Discussion: In some cases, it may be appropriate to include teaching methods and approaches in a child's IEP. As used in the definition of "special education" under § 300.26, the term "specially-designed instruction" means "adapting, as appropriate to each eligible child under this part, the content, methodology, or delivery of services * * * (i) to meet the unique needs of an eligible child under this part that result from the child's disability * * *"

In general, however, specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team.

With respect to Note 5 (that the reporting provision in § 300.347(a)(7)(ii) is intended to be in addition to regular reporting for all children), as addressed earlier in this attachment, the report described in § 300.347(a)(7)(ii) may be incorporated in the regular reporting to all parents. Therefore, Note 5 is not needed.

Changes: Notes 4 and 5 have been deleted.

Comment: Several comments were received on the transition services provision in § 300.347(b)(1), including requests that the regulations: (1) clarify what is meant by transition services for 14 year-old students; (2) add "daily living" and independent living" to the example in paragraph (b)(1)(i) because transition is much broader than employment; and (3) require that transition plans analyze and report the prospect of a student benefiting from higher education and if so what kind; and if vocational education is recommended and not general higher education, the transition plans specify the reason why general higher education is not a meaningful alternative.

A few commenters recommended that language be added to more clearly distinguish between "a statement of the transition service needs" of a student at age 14, and "a statement of needed transition services" at age 16. The commenters included a proposed definition that requires the identification of targeted post-school activities.

Discussion: The terms "a statement of the transition service needs" and "a statement of needed transition services" are incorporated verbatim from the statute. The purpose of "a statement of the transition service needs" is to focus on the planning of a student's courses of study during the student's secondary school experience (e.g., whether the student will participate in advanced placement or vocational education courses).

With respect to a statement of needed transition services, the focus is on the student's need for such services as he or she moves from school to postschool experiences, and any linkages that may be needed. These statements, as with the other components of the IEP, must be individualized in accordance with the needs of the student.

The Department has invested considerable resources in providing technical assistance in the area of transition services, and has a number of technical assistance resources available to public agencies in implementing these statutory provisions.

Changes: None.

Comment: A number of comments were received related to the provision in § 300.347(b)(2), that requires that if the IEP team determines that services are not needed in one or more of the areas specified in the definition of transition services, the IEP must include a statement to that effect and the basis upon which the determination was made. These commenters recommended that the provision be deleted because it is not statutory, not needed, and adds unnecessary and excessive paperwork.

Discussion: It is appropriate to remove the provision in § 300.347(b)(2) because, as stated by the commenters, the provision is not statutory and adds unnecessary paperwork.

That provision was based on the definition of "transition services" that was in effect prior to June 4, 1997, and did not account for the change in the definition of "transition services" that was made by the IDEA Amendments of 1997.

The "prior law" definition mandated the inclusion of specific components under the coordinated set of activities described in the definition. In recognition that all students with disabilities may not require services in all of the mandated areas, the final regulations implementing that provision (published in 1992) included a statement that "If the IEP team determines that services are not needed in one or more of the areas specified in [the definition of transition services], the IEP must include a statement to that effect, and the basis upon which the determination was made." However, while the new definition of "transition services" added by Pub L. 105–17 includes the same components as in prior law, the provision requiring the inclusion of all components in a student's IEP was removed.

Changes: § 300.347(b)(2) has been deleted.

Comment: Comments were received related to Notes 1, 6, and 7 following § 300.347 of the NPRM, all of which focus on the transition services requirements. Some commenters recommended that all three notes be deleted. Other commenters recommended that Note 7 be modified to encourage public agencies to begin transition services before age 14. A few commenters stated that Note 7 is not needed because the regulations are already clear.

Discussion: Consistent with the Department's decision to not include notes in the final regulations, the notes should be deleted.

Changes: Notes 1, 6, and 7 have been deleted.

Comment: With respect to the transfer of rights at the age of majority (§ 300.347(c)), one commenter stated that the provision should be deleted. Another commenter stated that there is general confusion about this provision, especially when parents are unable financially or unwilling to seek legal guardianship for their child, and added that schools need guidance. A commenter asked, how do LEAs determine which students get transfer rights at age 18; and once transferred, does the LEA still have to notify the parents.

Another commenter requested that the regulations allow a student to authorize the continued participation of the student's parent or guardian after the age of majority to develop, review, or revise an IEP, and added that if the student authorizes parent participation, the parent should be considered a member of the IEP team.

Discussion: The provision at § 300.347(c) is statutory. Whether or not rights transfer at the age of majority depends on State law, and, consistent with § 300.517, whether or not the student has been determined incompetent under State law. State law also determines what constitutes the age of majority in that jurisdiction. The discussion concerning § 300.517 in this attachment provides a fuller explanation of the provision concerning the transfer of rights at the age of majority. Generally, a public agency will satisfy § 300.347(c) if, at least one year before the student reaches the age of majority under State law, the agency informs the student of the rights that transfer at the age of majority (and includes a statement to that effect in the IEP). If the public agency receives notice of the student's legal incompetency, so that no rights transfer to the student at the age of majority, the IEP need not include this statement.

The composition of the IEP team is discussed in § 300.344. There is nothing in the regulation that would prevent a student to whom rights have been transferred at the age of majority from exercising his or her discretion under § 300.344(a)(6) to include in the IEP team a parent as an individual with knowledge regarding the child.

Changes: None.

Private School Placements by Public Agencies (§ 300.349)

Comment: Some commenters suggested that § 300.349(a) be amended to require a public agency to conduct a subsequent IEP meeting before or shortly after actual enrollment with the participation of a representative of the private school.

A few commenters objected to the requirement in § 300.349(a)(2) that the public agency ensure that a representative of a private school or facility at which a disabled student is publicly-placed or referred must attend the initial IEP meeting initiated by the public agency. These commenters recommended that a private school representative be invited but not be forced to attend, since distance could prevent that individual from attending.

Another recommendation made by commenters was that private school staff should not be required to attend the IEP meeting required under § 300.349(a)(2), but that the IEP team should be allowed to confer with private school staff after the meeting. One commenter asked whether if the private school initiates an IEP meeting, all of the individuals identified in § 300.344 must participate.

Another commenter was concerned that this section implies that the team has predetermined placement, and recommended requiring that a second meeting should be held with private school staff to determine if they could provide the services.

One commenter also indicated that § 300.349(b)(2)(ii) is confusing, because it suggests that if either the parent or public agency disagrees with the changes proposed by the private school, those changes will not be implemented. This commenter also questioned why either party should have veto authority, and requested clarification regarding the responsibility to request a hearing. However, another commenter objected that this section gives a private school veto authority over a decision of the IEP team.

One commenter also objected to the use of "must ensure" in § 300.349(a) and (b), and recommended that more qualified language be substituted. Another commenter requested clarification that parents have the right to be reimbursed for costs incurred as a result of their participation at IEP meetings associated with their children's public placements at private schools or facilities.

Discussion: Section 612(a)(10)(B) of the Act makes clear that, as a condition of eligibility for receipt of Part B funds, States must ensure that children with disabilities placed in or referred to private schools or facilities by public agencies receive special education and related services, in accordance with an IEP, at no cost to their parents. This statutory requirement substantially reflects prior law in this area. Section 300.401 also provides that IEPs for children with disabilities who are publicly placed at or referred to private schools must meet the requirements of §§ 300.340–300.350.

Because these disabled children are publicly-placed or referred to private schools or facilities as a means of ensuring that they are provided FAPE, it would not be appropriate to change the regulatory language in the manner suggested by these commenters. The regulation gives public agencies and private schools and facilities some flexibility in the manner in which IEP meetings are conducted; however, there is no need to require additional meetings, since these meetings can be initiated by the public agency or requested by the private school or facility at any time.

Regarding concerns about participation of representatives of private schools at meetings to develop the child's IEP, § 300.349(a)(2) provides that before a child with a disability is placed or referred to a private school or facility, a representative of that private school must be invited to the meeting to develop the student's IEP. However, if the private school representative is unable to attend in person, the public agency must use other methods to ensure that individual's participation at the meeting, including individual or conference telephone calls. Therefore, this regulation does not require participation of a private school representative if that individual is unable to attend the IEP meeting initiated by the public agency.

If a public agency initiates an IEP meeting in connection with a disabled child's placement at or referral to a private school or facility, the requirements of § 300.344 regarding participants at meetings apply. However, after the disabled child enters the private school or facility, § 300.349(b)(1) provides that the private school or facility, at the public agency's discretion, may initiate and conduct meetings for purposes of reviewing or revising the child's IEP. Section 300.344 applies to all IEP meetings for which a public agency is responsible, including those conducted by a private school or facility for a publicly-placed child with a disability.

If a public agency exercises its discretion under § 300.349(b)(1) to permit the private school or facility to initiate and conduct certain IEP meetings, § 300.349(b)(2) specifies that the public agency is still responsible for ensuring that the parents and a public agency representative are involved in those IEP decisions and agree to any changes in the child's program before they are implemented.

Section 300.349(b) does not afford veto authority either to the parents and the public agency, or to the private school, if there is a disagreement about the IEP for the child to be implemented at the private school. This is equally true for IEPs developed for public placements of children with disabilities at private schools.

Further, § 300.349(c) makes clear that the public agency is ultimately responsible for ensuring that the publicly-placed disabled student receives FAPE. Therefore, regardless of whether the public agency initiates meetings for the purpose of reviewing and revising IEPs of children with disabilities publicly-placed at private schools or facilities, the public agency must ensure that the child's IEP is reviewed at least once every twelve months, and that the child's placement at the private school or facility is in accordance with that child's IEP.

If the public agency disagrees with changes proposed by the private school, the public agency nevertheless remains responsible for ensuring that the student receives an appropriate program. If the private school or facility is unwilling to provide such a program, the public agency either must ensure that the student's IEP can be implemented at that or another private school or facility, or must develop an appropriate public placement for the child to address that child's needs. In all instances, the child's placement at the private school or facility must be based on the child's IEP, and that placement must be the LRE placement for the child.

The commenter's assumption that normal due process rights would apply is correct. The due process rights of Part B are available to parents and public educational agencies to resolve issues such as the appropriateness of the child's program at the private school, but representatives of private schools or facilities at which children with disabilities are publicly placed or referred do not have due process rights.

Regarding a parent's right to reimbursement for costs associated with their child's private school placement, § 300.401 reflects the statutory requirements of section 612(a)(10)(B) and requires that a disabled student's placement at a private school by a public agency must be at no cost to the child's parents, and public agencies must ensure that all of the rights guaranteed by Part B are afforded to publicly-placed children with disabilities and their parents. The "at no cost" requirements of the Act also would require public agencies to reimburse parents for transportation and other costs associated with their participation at IEP meetings conducted in a geographic area outside of the jurisdiction of the LEA, and such expenditures traditionally have been considered the responsibility of the public agency. *See* discussion under § 300.24 of this attachment.

Changes: None.

Children With Disabilities in Religiously-Affiliated or Other Private Schools

Comment: One commenter suggested that this section be amended to require IEPs for all children with disabilities in the LEA's jurisdiction who are placed by their parents at private schools, regardless of whether these children receive services from the public agency. Another commenter requested that the requirement for IEPs for children with disabilities who are publicly-placed at private schools be removed, and that requirements regarding service plans for children with disabilities placed by their parents at private schools be substituted and moved to Subpart D.

Discussion: There is no statutory authority to require public agencies to develop IEPs for every child with a disability in their jurisdiction placed by their parents at a private school, regardless of whether that child receives services from the LEA. Section 612(a)(10)(A) of the Act requires States to make provision for the participation of private school children with disabilities in programs assisted or carried out under this part, through the provision of special education and related services, to the extent consistent with their number and location in the State.

Because private school children with disabilities do not have an individual entitlement to services under Part B, it would be inconsistent with the statute to require public agencies to develop service plans for those private school children with disabilities who do not receive services from the public agency. However, the commenter's suggestion that proposed § 300.350 should be deleted and that a requirement for service plans for children with disabilities parentally-placed at private schools should be substituted and moved to Subpart D is reasonable.

Since private school children with disabilities are not entitled to receive FAPE in connection with their private school placements (*See* § 300.403(a)), it is misleading to use the term IEP to refer to the plans that are developed to serve them. IEPs must contain, among other elements, the full range of special education and related services provided to children with disabilities under these regulations.

By contrast, § 300.455(b) makes clear that a private school child with a disability receives only those services that an LEA determines it will provide that child, in light of the services that the LEA has determined, through the requirements of §§ 300.453–300.454, it will make available to private school children with disabilities.

Therefore, proposed § 300.350 should be deleted and its content incorporated in § 300.454 with appropriate revisions, and § 300.455(b) should be revised to reflect a new requirement for service plans for those private school children with disabilities in the LEA's jurisdiction that the LEA has elected to serve in light of the services it makes available to its private school children with disabilities in accordance with the requirements of §§ 300.453–300.454.

Changes: Proposed § 300.350 has been deleted, and a new § 300.454(c) has been added to specify LEA responsibilities regarding development of service plans for private school children. Section 300.455(b) has been changed to reflect the new provision regarding service plans for private school children with disabilities.

IEP—Accountability (§ 300.350)

Comment: Some commenters agreed with this regulation, while other commenters recommended that the note either be revised or deleted. Some commenters believe that both the section and note are inconsistent with Congressional findings on low achievement and new performance standards.

Commenters also recommended that the regulation be strengthened to clarify (1) the district's obligation to monitor, review and revise the IEP if it is not having the desired impact on the student's progress; (2) the parent's responsibility to request an IEP meeting when progress reports indicate that the child's IEP is not effective; (3) the extent of the teacher's responsibility compared with that of the parent and child; and (4) that public agencies and personnel will not be held accountable if a child does not achieve the growth projected in annual goals and benchmarks or objectives if they were implementing an IEP that provided the child appropriate instruction, services and modifications.

Other commenters were concerned about the potential negative effect of this section on the effective implementation of transition services.

Discussion: Section 300.351 has been included in the IEP provisions of the Part B regulations since those regulations first were issued in 1977. It continues to be necessary to make clear that the IEP is not a performance contract and does not constitute a guarantee by the public agency and the teacher that a child will progress at a specified rate. Despite this, public agencies and teachers have continuing obligations to make good faith efforts to assist the child in achieving the goals and objectives or benchmarks listed in the IEP, including those related to transition services.

In addition, it should be noted that teachers and other personnel who must carry out portions of a child's IEP must be informed about the content of the IEP and their responsibility regarding its implementation. Because the clarification of this issue that was previously included in the note to this section is essential to the proper implementation of the Act's IEP requirements, a statement regarding the responsibilities of public agencies and teachers to make good faith efforts to ensure that a child achieves the growth projected in his or her IEP has been included at the conclusion of this section.

In order to meet the new emphasis in the Act that children with disabilities be involved in and progress in the general curriculum and be held to high achievement standards, the IEP provisions must be effectively utilized to ensure that appropriate adjustments can be made to address performance issues as early as possible in the process.

This section does not limit a parent's right to complain and ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that these efforts are not being made. Further, this section does not prohibit a state or public agency from establishing its own accountability systems regarding teacher, school or agency performance if children do not achieve the growth projected in their IEPs.

Changes: The note to this section has been removed. Section 300.351 is redesignated as § 300.350 of these final regulations, and the substance of the note has been added to this section.

Use of LEA Allocation for Direct Services (§ 300.360)

Comment: Very few comments were received regarding this section. One comment recommended that the words "or unwilling" be added to § 300.360(a)(2) to correspond to the language of § 300.360(a)(3) of the current regulations. Another comment asked that the language in the second paragraph in the note following § 300.360 be updated to substitute the word "disabled" for the word "handicapped." This comment also requested that a similar change be made to the note following § 300.552.

Discussion: Section 300.360(a) essentially incorporates the text of the current regulatory provision verbatim, except with the minor modifications contained in section 613(h)(1) of Pub. L. 105–17. The legislative history makes clear that § 613(h)(1) has been "retained without substantive alteration" from prior law. (S. Rep. No. 105–17 at 15). It is true that under § 300.360(a)(3) of the regulations, an SEA may use funds that would have gone to an LEA for direct services if the SEA finds that the LEA either is unable or unwilling to establish and maintain programs of FAPE for children with disabilities. This regulatory provision implemented section 614(d)(1) of prior law which contained the reference to LEAs that were unwilling to establish and maintain programs of FAPE. However, since these words have not been retained in section 613(h)(1) with regard to an LEA's or State agency's failure to establish and maintain programs of FAPE, yet remain in the statute with regard to an LEA's failure to consolidate with other LEA's in applying for Part B funds, it is not appropriate to make the change requested by this comment.

Consistent with the general decision to not include notes in these final regulations, the note following § 300.360 should be deleted. However, the substance of the note related to the SEA's responsibility to ensure the provision of FAPE if an LEA elects not to apply for its Part B funds, or the amount of Part B funds is not sufficient to provide FAPE should be added to the text of the regulations because of its importance in ensuring that the purposes of this part are appropriately implemented.

A new paragraph also should be added to clarify, by referencing § 300.301, that the SEA may use whatever funding sources are available in the State to carry out its responsibilities under § 300.360.

Regarding the note following § 300.360, it is important to point out that the language that uses "handicapped" instead of disabled was taken verbatim from the original regulations for this program issued in 1977. Included in this note were direct quotations from the Department's regulation implementing Section 504 of the Rehabilitation Act of 1973 at 34 CFR Part 104, which has not yet been updated to substitute the term "disabled" or "disability" for the term "handicapped" or "handicap." While the term "handicapped" is not consistent with current statutory language, it is not appropriate to modify the quoted language in the notes until the terminology in the Section 504 regulation is updated.

Changes: The substance of the note relating to SEA's responsibilities to ensure FAPE when the LEA elects not to receive its Part B funds, or there are not sufficient funds to ensure the provision of FAPE has been added to the text of the regulation. The note has been deleted. A reference is made to other funding sources under § 300.301.

Use of SEA Allocations (§ 300.370)

Comment: Several favorable comments were received regarding this section. One comment supported paragraph (a)(4), which permits the use of State agency allocations to assist LEAs with personnel shortages. One comment requested that a new paragraph (c) be added to reflect the statutory requirement "that LEAs participate in the priority setting for the allocation of these funds." One comment requested that a note be added following this section to clarify that direct services "can include using the State allocation of Part B funds to help LEAs cover unexpected and extraordinary costs of providing FAPE to a child with a disability in any setting along the continuum."

Discussion: There is no statutory requirement that would require a State to obtain input from LEAs in setting priorities for how the State agency allocation should be spent. So long as the expenditures are consistent with the requirements of this part, States have discretion to determine the manner in which the funds are allocated.

Regarding the suggestion that a note be added following § 300.370, consistent with the decision to not include notes in these regulations, a note will not be added. However, the State agency allocation may be used for direct and support services, including the expenditure described in this comment. Nothing in this part would preclude an SEA from using its State allocation to assist an LEA in defraying the expenses of a costly placement for a student with a disability if it is determined that such a placement is necessary to ensure the provision of FAPE to that disabled student.

Changes: No change has been made in response to these comments. See discussion of comments received under § 300.712 regarding a change to § 300.370.

General CSPD Requirements (§ 300.380)

Comment: A number of comments were received regarding the recruitment and training of hearing officers included as part of CSPD. One comment recommended that § 300.380(a)(2) regarding an adequate supply of qualified special education, regular education, and related services personnel be expanded to include hearing officers and mediators.

Some commenters recommended that § 300.381 include a provision requiring each state "to establish a council of parents, educators, attorneys, hearing officers, and mediators to develop and oversee the recruitment, training, evaluation, and continuing education of hearing officers and mediators" and to ensure that they receive pre-service training and at least annual in-service training on special education law and promising practices, materials and technology.

A number of commenters indicated that, in order for personnel to be "qualified" under this part or a State's CSPD, "the personnel must meet the State's legal licensing or certification requirements" and "must have the skills and knowledge necessary to ensure that personnel are qualified to work with children with disabilities." Another comment sought clarification regarding use of Part B funds for the training of regular education personnel.

Consistent with the emphasis on implementation, one comment recommended that § 300.380(a)(4) be amended to require that a State's CSPD be updated at least every two years, instead of at least every five years, as stated in the NPRM, "and as often as the quality of education for children with disabilities within the State may require." The comment also objected that the regulation provides that States that have a State Improvement Plan under section 653 of the Act have met their CSPD requirements. Therefore, the comment recommended that § 300.380(b) be deleted, and instead be replaced with the last paragraph of the note following § 300.135, which gives a State that has a State Improvement Plan the option of using it to meet its CSPD, if it chooses to do so.

Discussion: States must ensure that mediators and hearing officers are appropriately trained and have the requisite knowledge and expertise regarding the requirements of this part. Otherwise, the due process rights of children with disabilities and their parents may not be adequately safeguarded under this part.

With respect to mediators, section 615(e)(2)(A)(iii) requires that SEA or LEA procedures for mediation ensure that the mediation is conducted by a qualified and impartial mediator who is trained in effective mediation techniques. Section 615(e)(2)(C) requires the State to maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services to children with disabilities.

Under current regulations, public agencies must maintain a list of impartial hearing officers and their qualifications. Further, the SEA's responsibility under section 615 of the Act to ensure that the procedural safeguard requirements of the Act are established and implemented includes the responsibility to ensure that impartial due process hearing officers are appropriately trained. In addition, § 300.370 makes clear that one of the support services for which the Part B funds reserved for State level activities may be expended is the training of hearing officers and mediators.

The comments regarding ensuring that personnel meet State licensing or certification requirements or are otherwise qualified under this part are addressed elsewhere in this attachment in the discussions of qualified personnel and personnel standards. With regard to the training of regular education personnel, consistent with a State's CSPD responsibilities, the State must ensure an adequate supply of special education, regular education, and related services personnel. Further, the training of regular education personnel is necessary to the proper administration of the Act and regulations, including carrying out the Act's LRE provisions, and personnel development is an appropriate expenditure of funds under this part and is one of the support services for which the State level allocation under § 300.370 may be expended.

Finally, there is nothing in this part that would prevent a State from updating its CSPD more frequently than at least every five years if the State chooses to do so. Therefore, there is no reason to incorporate the language from the second paragraph of the note following § 300.135 in place of § 300.380(b), since § 300.380(b) gives a State that has a State Improvement plan under section 653 the option of using it to satisfy its CSPD obligations, if the State chooses to do so.

Changes: The section has been retitled "General CSPD requirements."

Adequate Supply of Qualified Personnel (§ 300.381)

Comment: Only a few comments were received regarding this section. Some commenters requested that a provision be added to § 300.381(b) "requiring the State to describe the strategies it will use to address personnel vacancies and shortages" identified under that section. Another comment recommended that this section highlight shortages of personnel to do behavioral assessments and programming. Another comment recommended that additional language be included in § 300.381 requiring additional recruitment strategies and fiscal arrangements to ensure an adequate supply of qualified personnel.

Discussion: It is acknowledged that it is very important to ensure that appropriately-trained and knowledgeable individuals conduct behavioral assessments of children with disabilities under this part. However, the obligation under § 300.381 is a general obligation to analyze State and local needs for professional development, including areas in which there are shortages, to ensure an adequate supply of qualified special education, regular education, and related services personnel under this part. Therefore, the regulation does not identify specific categories of personnel. In addition, States already have the ability to develop additional recruitment strategies and fiscal arrangements if they determine that they are needed to address their particular personnel needs.

Changes: None.

Improvement Strategies (§ 300.382)

Comment: One comment recommended that the name of this section be changed to "Comprehensive system strategies" to avoid confusion with Part D. Another comment recommended that the words "content knowledge and collaborative skills" to meet the needs of infants and toddlers and children with disabilities be expanded to specify which skills are involved, and suggested that skills such as instruction, behavioral management, communication, and collaboration be included.

One comment expressed concern that the section in the NPRM was not sufficiently strong to ensure that States design their CSPD to ensure that core instructional and related needs of children with disabilities are appropriately addressed. One comment requested clarification regarding which entity in the State is responsible for ensuring that the requirements of § 300.382 are met. One comment suggested that the reference to behavioral interventions in § 300.382(f) should be changed to positive behavioral supports to be more consistent with other provisions of these regulations.

Several comments were receive regarding § 300.382(g), particularly regarding the use of the phrase, "if appropriate." One comment requested clarification on how "appropriate" would be defined, as well as guiding principles "for directing the adoption of promising practices." Another comment recommended that the phrase, "if appropriate" be eliminated when referring to the State's adoption of promising practices and materials and technology.

One comment was particularly favorable about the requirement for joint training of parents, special education and related services providers, and general education personnel. Another comment recommended that this section be expanded to include joint training of hearing officers and mediators with parents and education personnel.

One comment recommended that this section be amended "to require reports to the Department by the SEA bi-annually, including a survey of parents of students with IEPs regarding the effectiveness of the strategies and other tools being taught to teachers," and that parents "should also be given the chance to state what tools they think ought to be taught" to teachers. One comment recommended that a note be added following this section to clarify that the assurance that regular education and special education personnel be prepared means that "they must be required to be prepared rather than simply 'offered the opportunity.' "

Discussion: There is no need to change the name of this section since it is unlikely that, even if it were changed, it would reduce the potential for confusion between CSPD responsibilities under Part B and those under Part D. While the delineation of content and skills for personnel serving infants and toddlers and children with disabilities is important, inherent in CSPD is the obligation of each State to identify its particular personnel development needs in light of factors that are specific to each individual State. The same is true with respect to strategies and needs. The CSPD is one of several mechanisms that States have to ensure that children with disabilities receive appropriate instruction and services consistent with the purposes of this part; therefore, the regulations do not specify which needs must be addressed through CSPD.

References throughout this part to State mean the SEA, unless the State has designated an entity other than the SEA to carry out the functions of this part. Regarding § 300.380(f), that section is directed at the State's enhancement of the ability of teachers and others to use strategies, including behavioral interventions. The regulatory language about behavioral interventions parallels the language in section 614(d)(3)(B)(i) of the Act.

It also should be pointed out that the term behavioral interventions is a broad term that includes positive behavioral supports. Regarding the use of "appropriate" in § 300.382(g), a State's obligation to adopt promising educational practices, materials, and technology is dependent on the State's needs. Hence, the use of the words "if appropriate" in this regulation ensures States have flexibility in this area.

The discussion of the role of hearing officers and mediators in response to comments on § 300.380 also applies to the suggestion on joint training of parents and special education and related services and general education personnel required by § 300.382(j) of these regulations. It is important to point out that there is nothing in this part that would preclude a State from including hearing officers and mediators in the joint training activities if it chooses to do so.

The comment's suggestion for additional reporting requirements has not been accepted. While input from parents regarding the effectiveness of personnel development strategies would be useful, the Department is committed to reducing paperwork burdens rather than increasing them.

Finally, with regard to training of general education personnel, § 300.382(j) already requires the participation of these individuals in joint training activities.

Changes: None.

Subpart D

Responsibility of SEA (§ 300.401)

Comment: Several commenters asked that § 300.401(a)(3) specify whether the standards that apply to private schools are limited to those necessary for the comparable provision of special education and related services to those provided in public agencies (for example, do private schools have to comply with SEA personnel standards beyond the qualifications needed to provide special education and related services).

Discussion: Children with disabilities who are placed by public agencies in private schools are entitled to receive FAPE to the same extent as they would if they were placed in a public school. FAPE includes not just the special education and related services that a child with a disability receives, but also includes an appropriate preschool, elementary and secondary school education in the State involved and must be provided in conformity with the child's IEP.

The IDEA Amendments of 1997 made a number of changes to reinforce the importance of the participation of children with disabilities in the regular education curricula and the need for children with disabilities to have the opportunity to receive the same substantive content as nondisabled students. These include provisions that tie IEP goals and objectives to the regular education curriculum (section

614(d)(1)(A)), establish performance goals and indicators for children with disabilities consistent with those that a State establishes for nondisabled children (section 612(a)(16)), and require the participation of children with disabilities in the same general State and district-wide assessments as nondisabled students (section 612(a)(17)).

Because of these changes in the statute and the confusion that has existed over whether all aspects of the education provided by private schools to publicly-placed children with disabilities had to meet the standards that apply to public agencies, a change should be made in the regulations to ensure that children who are publicly-placed in private schools receive services consistent with the SEAs' statutory obligation to ensure that FAPE is provided. SEAs must ensure that public agencies that place children with disabilities in private schools as a means of providing FAPE make sure that the education provided to those publicly-placed children with disabilities meets all standards that apply to educational services provided by the SEA and LEA that are necessary to provide FAPE.

With respect to personnel standards, for example, this would mean that all personnel who provide educational services (including special education and related services and non-special education services) meet the personnel standards that apply to SEA and LEA personnel providing similar services. The responsibility for determining what constitutes the appropriate personnel standard for any given profession or discipline is a State and local matter and State and local officials have great flexibility in exercising this responsibility. With regard to special education and related services personnel, however, the regulations provide some parameters for how personnel standards are developed. (See, §§ 300.21, 300.135, and 300.136).

Changes: A change has been made to specify that a child with a disability placed by a public agency as the means of providing FAPE to the child must receive an education that meets the standards that apply to the SEA and LEA.

Implementation by SEA (§ 300.402)

Comment: Another issue raised by comment was whether the term "public agency" in § 300.402(b) referred to just public schools or included other agencies. Some commenters requested that the term "applicable standards" in that paragraph be clarified to include application, compliance, on-site visits, monitoring, curriculum and evaluation standards. Several commenters requested various expansions of § 300.402(c) such as adding a 120-day consultation period prior to adoption of standards that apply to private schools, and requiring consultation in all phases of the development and design of SEA standards and compliance and monitoring procedures that apply to these private schools.

At least one commenter requested a new provision be added establishing a mechanism for appeals to the Secretary on standards that an SEA wants to apply to private schools.

Discussion: The term "public agency" as used in these regulations is defined in § 300.22. The term "applicable standards" is sufficient to encompass the variety of standards that SEAs may have that apply to private schools accepting public agency referrals of children with disabilities for the provision of FAPE. Further regulation about how States provide opportunities for private schools and facilities to participate in the development and design of State standards that apply to them is inappropriate. States should have flexibility in developing standards that meet the requirements of the IDEA.

The standards that SEAs apply to private schools accepting public agency referrals of children with disabilities for the provision of FAPE are, so long as they meet the requirements of Part B and its regulations, a State matter, so no appeal to the Secretary is appropriate.

Changes: None.

Placement of Children by Parent if FAPE is at Issue (§ 300.403)

Comment: Some commenters stated that some school districts may be using this provision as the basis for denying special education services to children with disabilities voluntarily enrolled in a private school and requested that the regulations make clear that these children are covered by the provisions of the regulations regarding participation of private school children in the Part B program.

Discussion: The statute in section 612(a)(10)(C)(i) is clear that an LEA must provide for the participation of parentally-placed private school children with disabilities in the Part B program with expenditures proportionate to their number and location in the State, even though the LEA is not otherwise required to pay the costs of education, including special education and related services, for any individual child with a disability who is voluntarily placed in a private school under the terms of § 300.403.

Changes: A change has been made to § 300.403(a) to clarify that the provisions of §§ 300.450–300.462 apply to children with disabilities placed voluntarily by their parents in private schools, even though the LEA made FAPE available to those children.

Comment: One commenter requested that the regulations clearly state whether a public agency must evaluate and develop an IEP for each private school child with a disability each year in order to avoid potential reimbursement claims.

Discussion: The new statutory provisions, incorporated in the regulations in § 300.403 (c), (d), and (e), provide that, as a general matter for children with disabilities who previously received special education and related services under the authority of a public agency, the claim for reimbursement of a private placement must be made before a child is removed from a public agency placement. It would not be necessary for a public agency to develop an IEP that assumes a public agency placement for each private school child each year. LEAs do have ongoing, independent responsibilities under the child find provisions of §§ 300.125 and 300.451 to locate, identify and evaluate all children with disabilities in their jurisdiction, including children whose parents place them in private schools. This would include scheduling and holding a meeting to discuss with parents who have consented to an evaluation, the results of the evaluation, the child's needs, and whether the child is eligible under Part B. (See §§ 300.320, and 300.530–300.535.)

In addition, the LEA must offer to make FAPE available if the child is enrolled in public school. A new evaluation need not be performed for each private school child each year, but evaluations for each private school child must meet the same evaluation requirements as for children in public agency placements, including the requirement for reevaluation in § 300.536. In addition, since LEAs must make FAPE available to all children with disabilities in their jurisdiction (§§ 300.121, 300.300), public agencies must be prepared to develop an IEP and to provide FAPE to a private school child if the child's parents re-enroll the child in public school.

Changes: None.

Comment: Several commenters requested that paragraph (c) be revised to prohibit reimbursement if the private placement is inappropriate, which was a part of the Supreme Court's standard on reimbursement announced in *School Comm. of Burlington* v. *Department of*

Ed. of Mass., 471 U.S. 359 (1985) (*Burlington*). Another commenter requested that the term "timely manner" be defined.

Another commenter requested that the Department clarify that the provisions of § 300.403 (c), (d), and (e) apply only in situations in which the child previously has received special education and related services under the authority of a public agency. In other situations, where the child has not yet been provided special education and related services, the Department should recognize that hearing officers and courts still retain broad equitable powers to award relief, and will continue to apply the reimbursement standard in *Burlington*.

Discussion: It is not in the public interest to require that public funds be spent to support inappropriate private placements. For these reasons, paragraph (c) should be revised consistent with the basic standard for reimbursement articulated by the Supreme Court in the *Burlington* and *Carter* cases. Since, as the Supreme Court made clear in *Carter*, in instances where the school district has not offered FAPE, the standard for what constitutes an appropriate placement by parents is not the same as the standards States impose for public agency placements under the Act, this new provision makes clear that parental placements do not need to meet State standards in order to be "appropriate" under this requirement.

As a commenter noted, hearing officers and courts retain their authority, recognized in *Burlington and Florence County School District Four* v. *Carter*, 510 U.S. 7 (1993) (*Carter*) to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii) in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

The term "timely manner" should not be defined, since what constitutes timely provision of FAPE is best evaluated within the specific facts of individual cases. (See, *e.g.*, §§ 300.342(b) and 300.343(b)).

Changes: Paragraph (c) has been revised to include the requirement that the private placement by the parents must be appropriate (as determined by a court or hearing officer) in order to be eligible for reimbursement, and to make clear that a parental placement does not need to meet the State standards that apply to education provided by the SEA and LEAs in order to be found to be appropriate.

Comment: A number of commenters suggested definitions of various terms used in § 300.403(d) and (e) and other changes to the provisions of these paragraphs, some of which would have made recovering reimbursement more difficult for parents and others which would have limited school districts' use of these provisions in defense of a reimbursement claim.

Discussion: With the exception of making clear that the regulation also applies when parents choose to enroll their child in a private preschool program, no change is necessary. The regulation in § 300.403(d) and (e) reflects the statutory language, which balances the interests of parents and public agencies. (See the explanation of the definition of "business day," under the discussion of comments to § 300.8, a term which is used in several places in these regulations.)

Changes: Paragraph (c) has been revised to specify that the reimbursement provisions of § 300.403 also apply if parents of a child with a disability who previously received special education and related services under the authority of a public agency enroll the child in a private preschool program.

Definition of "Private School Children With Disabilities" (§ 300.450)

Comment: Several commenters asked that the Department clarify whether children with disabilities who are home-schooled are included in the definition of "private school children with disabilities".

Discussion: State law determines whether home schools are "private schools." If the State recognizes home schools as private schools, children with disabilities in those home schools must be treated in the same way as other private school children with disabilities. If the State does not recognize home schools as private schools, children with disabilities who are home-schooled are still covered by the child find obligations of SEAs and LEAs, and these agencies must insure that home-schooled children with disabilities are located, identified and evaluated, and that FAPE is available if their parents choose to enroll them in public schools.

Changes: None.

Child Find for Private School Children With Disabilities (§ 300.451)

Comment: Some commenters stated that there have been major difficulties in many areas of the country in ensuring that private school children with disabilities are identified and evaluated. Some commenters also noted the new statutory provision limiting the amount of funds that must be spent on parentally-placed private school children with disabilities based on the number of identified parentally-placed private school children with disabilities creates an additional need for timely and effective child find for this population. These commenters requested that the regulation be revised to require that consultation with appropriate representatives of private school children occur before the public agency conducts child find activities and to provide that child find activities for parentally-placed private school children be done on the same or comparable timetable as for public school children. Another commenter requested that child find activities include children placed by their parents in private residential facilities.

Discussion: The role of child find for parentally-placed private school children is very important for services for this population. Section 612(a)(10)(A)(i) and the regulations in § 300.452 tie the amount of money that will be used for parentally-placed private school children with disabilities to the number of parentally-placed private school children with disabilities in each LEA. Clearly, the adequacy of the LEA's child find activities for parentally-placed private school children with disabilities will be crucial to determining how many children with disabilities are parentally-placed in private schools, and consequently, the amount of funds that must be spent by an LEA on special education and related services to parentally-placed private school children with disabilities. For these reasons, LEAs should consult with representatives of private school children with disabilities on how to conduct child find activities for parentally-placed private school children with disabilities in a manner that is comparable, which would include timing, to child find for public school children with disabilities.

LEAs are required to conduct child find activities for children residing in their jurisdiction. Generally, as a matter of State law, children are considered to reside in the home of their parents even if they physically do not live there. Whether children who are in private residential facilities are residing in the jurisdiction of an LEA when that facility is within the boundaries of the LEA will be dependent on State law.

Changes: The term "religiously-affiliated" has been replaced with "religious," to more accurately reflect the types of schools. The term "public agency" has been replaced with "LEA," a technical change. Paragraph (a) has been revised (see description of comments received under § 300.453 regarding that revision). A new paragraph (b) has been added requiring public agencies to consult with representatives of parentally-placed private school students with disabilities on how to conduct child find activities for that population in a manner that is comparable to that for public school children.

Provision of Services—Basic Requirement (§ 300.452)

Comment: None.

Discussion: None.

Changes: Consistent with the comments, discussion, and changes under § 300.341, a new paragraph (b) has been added to § 300.452 regarding the SEA's responsibility for ensuring that a services plan is developed and implemented for each private school child with a disability who has been designated to receive special education and related services under this part.

Expenditures (§ 300.453)

Comment: One commenter asked for clarification that there is no obligation to spend more than the total per capita Federal allocation to the LEA, and use of State or local funds are not required, for private school children. Another commenter requested that the note following this section be integrated into the regulation, as it provided valuable guidance to States. Several commenters were concerned that LEAs were suggesting that no services needed to be provided to private school students as a proportional share of the Federal funds was being used to conduct evaluations of these children. Another commenter asked whether a longstanding State program that allocates funding to be used for private school children for certain special education and related services and evaluations can be used to satisfy the requirements of this section.

Several commenters noted the importance of determinations of the number of parentally-placed private school children with disabilities in calculating required expenditures and asked for specificity in how this number is determined. Another commenter requested that the Department require that each LEA separately account for funds used for private school children with disabilities and clarify that these funds are only to provide special education and related services and cannot be used to carry out activities such as child find.

Discussion: It is important to clarify that there is a distinction under the statute between the obligation to conduct child find activities, including individual evaluations, for parentally-placed private school children with disabilities, and the obligation to use an amount of funds equal to a proportional amount of the Federal grant to provide special education and related services to parentally-placed private school children with disabilities. The obligation to conduct child find, including individual evaluations, exists independently from the services provision described in §§ 300.452–300.456, and the costs of child find activities, such as evaluations, may not be considered in determining whether the LEA has spent the amount described in § 300.453 on providing special education and related services to parentally-placed private school children with disabilities.

The statute describes the minimum amount that must be spent on these services and does not specify that only Federal funds can be used to satisfy this obligation. Thus, if a State or LEA uses other funds to provide special education and related services to private school children, those funds can be considered in satisfying the provisions of § 300.453, so long as the services are provided in accordance with the other provisions of §§ 300.452–300.462.

The statute does not prohibit a State or LEA from spending additional State or local funds to provide special education and related services to private school children. To make this important point, in light of the general decision to remove all notes from these regulations, the note that followed this section in the NPRM should be incorporated into this section as paragraph (d).

Determining the number of parentally-placed private school children with disabilities is particularly important. Child find, which includes locating, identifying and evaluating children, is an ongoing activity that SEAs and LEAs should be engaged in throughout the year for all children in order to meet the statutory obligations to ensure that all children in the State are located, identified and evaluated and that all children have the right to FAPE. The statute does not distinguish between child find activities for children enrolled in public schools and those conducted for children enrolled in private schools.

In addition, the importance of child find for determining the amount to be spent on services for parentally-placed private school children with disabilities also argues for clarity in the regulations that child find activities for private school children with disabilities must be comparable to child find activities conducted for children in public schools. Further regulation also is necessary on determining the number of parentally-placed private school children with disabilities so as to eliminate the potential for disputes about how to determine the number of private school children with disabilities that will be used as the basis for the calculation and to provide a clear standard for LEAs to meet. Possible alternative standards for who to count, such as private school children referred for evaluation, or private school children with disabilities who are receiving services pursuant to §§ 300.450–300.462 are not consistent with the statutory language.

Since LEAs and SEAs are already counting children with disabilities who are receiving special education and related services on December 1 or the last Friday in October of each year (the State decides which date to use on a State-wide basis) for funding and data reporting purposes, conducting the count of eligible parentally-placed private school children with disabilities on that date as well is reasonable, reduces the amount of double counting of private school children with disabilities who move from one location to another, and gives States the same flexibility they have with regard to counting children with disabilities who are receiving services. Furthermore, this count will provide the public agencies the basis on which they will be able, consistent with § 300.454, to plan for the services that will be provided during the subsequent school year.

Changes: A new paragraph (c) has been added to § 300.453 to specify that the costs of child find activities for private school children with disabilities may not be considered in determining whether the LEA met the expenditures requirements of this section. A paragraph (d) has been added to clarify that States and LEAs are not prohibited from spending additional funds on providing special education and related services to private school children with disabilities. The note has been removed.

Section 300.451 has been revised to specify that child find activities for parentally-placed private school children with disabilities be comparable to child find activities for children with disabilities in public schools.

Section 300.453 has been revised to add a new paragraph (b) that specifies that each LEA consult with representatives of private school children with disabilities to decide how to conduct the count of the number of parentally-placed children with disabilities in private schools on December 1 or the last Friday of October for determining the amount that must be spent on providing special education and related services for private school children for the subsequent school year, and that the LEA ensure that count is conducted.

Services Determined (§ 300.454)

Comment: Several commenters requested clarification of "timely and meaningful" so that parents, private school representatives and LEAs would have a better understanding of how this process works. Various other suggestions included public notice of the consultation meetings, public transcripts of those meetings, and requiring explanations of refusals to provide service, and decisions on allocations of funds for services for private school children.

Discussion: The needs of private school children with disabilities, their number and their location will vary over time and, depending on the circumstances in a particular LEA, will differ from year to year. However, an annual consultation with representatives of private school children is not required, since States and LEAs are best able to determine the appropriate period between consultations based on circumstances in their jurisdictions.

Paragraph (b)(3) specifies that consultation must take place before decisions are made affecting the opportunities of private school children with disabilities to participate in the State's special education program which is assisted or carried out with Part B funds. The regulations on this consultation process have not been amended, in the expectation that all parties will treat others in the process with reason and respect.

Changes: No change was made in response to these comments. See discussion of comments received under § 300.350 regarding a change to § 300.454.

Services Provided (§ 300.455)

Comments: Several commenters expressed concern that using the term "IEP" in this section added to confusion over whether private school children served under these provisions were to receive all the services they need, or just those services that had been decided through the consultation process would be provided. Several suggested that a different term, "statement of special education and related services to be provided" be substituted. Other commenters objected to the definition of a term "comparable in quality" not used in the statute.

Discussion: The use of the term "IEP" could result in confusion about whether these children receive all the services they would have received if enrolled in a public school. A different term, services plan, will be used. However, to the extent appropriate given the services that the LEA has selected through the consultation process described in § 300.454, that services plan must meet the requirements for an IEP in order to ensure that the services are meaningfully related to a child's individual needs. For example, in almost all instances, the services plan developed for an individual private school child with a disability would have to meet the requirements of § 300.347(a)(1)–(4), (6) and (7).

Whether those statements would also have to meet the requirements of § 300.347(a)(5), (b) and (c) would depend on the services that are to be provided to the parentally-placed private school student with a disability. Paragraph (c) provides useful guidance to LEAs and parents that will prevent disputes. That content will be retained, but the definition should be eliminated.

Changes: Paragraph (a) has been retitled "General." Paragraph (b) has been revised by referring to a services plan instead of an IEP and by specifying that, for the services that are provided, the services plan, to the extent appropriate, must meet the content requirements for an IEP (§ 300.347) and be developed consistent with §§ 300.342–300.346. The useful content from paragraph (c) of the NPRM has been incorporated into paragraph (a).

Location of Services; Transportation (§ 300.456)

Comment: Some commenters requested that the Department require services to children in private schools be provided on-site, stating that providing services at a neutral site is disruptive and time consuming. Another asked for more specificity as to the phrase "consistent with law." Several commenters objected to the treatment of transportation in § 300.456(b), some stating that there is no individual right to transportation under the Act, while others noted that providing transportation services could use all the funds available for special education and related services. Others asked why a certain related service (transportation) had been singled out for special treatment.

Discussion: Decisions about whether services will be provided on-site or at some other location should be left to LEAs, in consultation with representatives of private school children. Although in many instances on-site services are most effective, local considerations should allow flexibility in this regard. A change should be made to § 300.454(b)(1) to make clear that where services are provided is subject to consultation with representatives of private school children.

The phrase "consistent with law" is statutory. As Note 1 following this section indicated, the Department's position, based on the decisions of the Supreme Court in *Zobrest* v. *Catalina Foothills School Dist.* (1993) and *Agostini* v. *Felton* (1997) is that there is no Federal constitutional prohibition on providing publicly-funded special education and related service on-site at private, including religious schools. These decisions make clear that LEAs may provide special education and related services on-site at religious private schools in a manner that does not violate the Establishment Clause of the First Amendment to the U.S. Constitution.

While the statute and regulation do not require the provision of services on-site to private school children, to the extent it is possible to do so, LEAs are encouraged to provide those services at private school sites so as to minimize the amount spent on necessary transportation and to cause the least disruption in the children's education. However, State constitutions and laws must also be consulted when making determinations about whether it is consistent with law to provide services on-site at a religious school.

If services are offered at a site separate from the child's private school, transportation may be necessary in order to get the child from one site to the other, or the child may be effectively denied an opportunity to benefit. In this sense then, transportation is not a related service but is a means of making the services that are offered accessible. LEAs should work in consultation with representatives of private school children to ensure that services are provided at sites that will not require significant transportation costs. In light of the decision to remove notes from the final regulations, paragraph (b) of this section should be revised to incorporate the concept from the note that transportation does not need to be provided between the child's home and the private school.

Changes: Section 300.456 has been retitled "Location of services; transportation." A technical change has been made to paragraph (a) to refer to religious schools rather than religiously-affiliated schools. Paragraph (b) has been revised to explain when transportation is required. Section § 300.454(b)(1)(iii) has been revised to specify that where services are provided is a subject of consultation between the LEAs and representatives of private school children. The notes following this section in the NPRM have been removed.

Complaints (§ 300.457)

Comment: Several commenters objected to § 300.457(a) because they believed that a child in a private school should be able to receive a due process hearing on complaints about services once the LEA has decided to provide services to that child. Most of those commenters indicated that there may be legitimate issues regarding whether the LEA complied with obligations to a specific child it had agreed to serve.

One commenter agreed with the position in the NPRM that if FAPE does not apply to private school children, due process also would not apply. Another commenter suggested that due process also should not apply to the child find obligations described in § 300.451.

Discussion: Section 615(a) of the Act specifies that the procedural safeguards of the Act apply with respect to the provision of FAPE to children with disabilities. The special education and related services provided to parentally-placed private school children with disabilities are independent of the obligation to make FAPE available to these children.

While there may be legitimate issues regarding the provision of services to a particular parentally-placed private school child with disabilities an LEA has agreed to serve, due process should not apply, as there is no individual right to these services under the IDEA. Disputes that arise about these services are properly subject to the State complaint procedures, which are available to address noncompliance with any requirement of Part B.

On the other hand, child find is a part of the basic obligation to make a FAPE available to all children with disabilities in the jurisdiction of the public agency, and so failure to properly evaluate a parentally-placed private school child would be subject to due process.

Changes: A new paragraph (b) has been added to specify that due process procedures do apply to child find activities, including evaluations.

Requirement That Funds not Benefit a Private School (§ 300.459)

Comment: One commenter asked how an LEA is to discern whether funds are being used to benefit the private school. Another questioned whether this provision is consistent with other provisions that allow funds to be used by an LEA to provide staff development for special and regular education personnel, consultative services and provisions that permit other children to also benefit when a teacher or other provider is providing special education or related services to a child with a disability.

Discussion: LEAs should use reasonable measures in assessing whether Federal funds are being used to benefit private schools. This provision does not prohibit private school teachers from participating in staff development activities regarding the provisions of IDEA when their participation can be accommodated.

If consultation services are provided to a private school teacher as a means of providing special education and related services to a particular private school child with a disability and that teacher uses the acquired skills in providing education to other children, whatever benefit those other children receive is incidental to the publicly funded services and is not prohibited by this provision.

On the other hand, if an LEA simply gave a private school an amount of money rather than itself providing or purchasing services for parentally-placed private school children with disabilities, in addition to violating the requirements of §§ 300.453 and 300.454, would raise very significant concerns about compliance with § 300.459(a).

In the interest of regulating only where necessary, the regulations do not further specify measures of when a private school is benefiting from the Federal funds.

Changes: None.

Use of Private School Personnel (§ 300.461)

Comment: One commenter noted that private school personnel used to provide services to private school children under Part B should be required to meet the same standards as public school employees providing those services to public or private school children.

Discussion: Section 300.455 specifies that services provided to private school children must be provided by personnel meeting the same standards as those providing services in public schools. This would apply to private school personnel who, under § 300.461, are being used to provide services under §§ 300.450–300.462 to private school children with disabilities.

Changes: A technical change has been made to § 300.461 to make clear that the services addressed are those provided in accordance with §§ 300.450–300.462.

Requirements Concerning Property, Equipment and Supplies for the Benefit of Private School Children With Disabilities (§ 300.462)

Comment: One commenter asked whether costs for inventory control can be considered as a part of the proportionate share of the LEA's Part B funds that are to be expended for providing services to private school children. The commenter also asked for specificity regarding the procedures to be used for maintaining administrative control of all property, equipment and supplies acquired for the benefit of private school children.

Discussion: Reasonable and necessary costs for inventory control of property, equipment and supplies located in a private school related to providing special education and related services to private school children with disabilities can be considered a part of the cost of providing special education and related services to private school children with disabilities. Effective procedures for ensuring administrative control will vary depending on local considerations.

Changes: None.

Subpart E Procedural Safeguards

General Responsibility of Public Agencies; Definitions (§ 300.500)

Comment: One commenter asked whether the definition of "evaluation" at § 300.500(b)(2) precludes the use of tests which are based on the general curriculum and which may be used with all children in a school or class as the primary means of evaluation. Another commenter asked if any evaluation after an initial evaluation is considered a reevaluation. It was also suggested that the revocation of consent only be allowed before the first day of the child's placement. There was also a request that the note (which concerns the non-retroactivity of a revocation by a parent of their consent) be included in the text of the regulation.

Some commenters also wanted a definition of "educational placement" included in § 300.500(b), consistent with prior policy issuances regarding the definition.

Discussion: The statutory changes to the evaluation procedures that are reflected in §§ 300.530–300.536 make clear that an "evaluation" will include review of existing data, which may include results on tests or other procedures that are based on the general curriculum and may be used with all children in a grade, school, or class. The definition of "evaluation" in the NPRM at proposed § 300.500(b)(2) had not been updated to recognize this change in the statute. Therefore, a change has been made to eliminate the last sentence in the proposed definition of "evaluation" so that it does not imply that an evaluation may not include a review of a child's performance on a test or procedure used with all children in a grade, school or class. This change does not mean that a public agency must obtain parental consent before administering a test used with all children unless otherwise required. (See § 300.505(a)(3)). Section 300.532 sets forth the procedures required to individually evaluate a child. Section 300.533 addresses the use of existing evaluation data which can include information available on the results of tests and procedures used for all children in a school, grade or class.

To distinguish an initial evaluation from a reevaluation, an initial evaluation of a child is the first completed assessment of a child to determine if he or she has a disability under IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated the first time in a State, a decision has been rendered that a child is eligible under IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation.

Regarding revocation of parental consent, parents cannot be forced to consent to decisions related to their child's education. However, it would be impractical to allow a parent to retroactively apply a revocation of consent where parental consent is required. Thus, once a parent consents to an educational decision concerning their child, be it an evaluation or provision of service(s), any revocation of their consent once the action to which they initially consented has been carried out will not affect the validity of the action. Since the non-retroactivity of a parent's revocation of consent is based on the Department's interpretation of the statute, and is important to make clear to all parties, it should be set forth in the regulation itself.

The educational placement of a child focuses on the implementation of a child's IEP and cannot be defined generally given that each child has different educational needs. Section 300.552 addresses the meaning of educational placement by describing the factors involved in making a placement decision and explains the concept in the context of the least restrictive environment. There is no additional benefit to defining further the term educational placement at § 300.500.

Changes: The note following this section has been deleted and § 300.500(b)(1)(iii) has been amended by adding language to clarify that a revocation of consent does not have retroactive effect if the action consented to has already occurred. Section § 300.500(b)(2) has been amended by removing the last sentence of that paragraph.

Opportunity to Examine Records; Parent Participation in Meetings (§ 300.501)

Comment: Some commenters asked that the term "all" with respect to meetings in § 300.501(a)(2) be deleted as that term is not used in the statute, as well as delete the term "all" with respect to the term "education records" and replace it with "special." Another suggestion was to require in § 300.501(a)(1) that copies of tests given to a child and manuals to interpret such tests be made available for the parents to review. One commenter asked whether therapy notes are considered educational records and another asked that the public agency be required to specify time periods within which the inspection and review right must be carried out.

Several commenters expressed concern that the definition of "meetings" was too narrow; the commenters recommended the definition be drafted to insure that it means any event where decisions are made regarding a child's identification, evaluation or placement. Others asked that the definition be removed entirely. It was also requested that the potential for any confusion regarding informal meetings held by school personnel be eliminated. Several commenters recommended deleting the reference at § 300.501(a)(2)(ii) to the provision of FAPE, claiming this would overly broaden the meetings at which parents should be given the chance to attend, precluding the ability for internal meetings without the parents. A commenter also asked that § 300.501(a)(2) include the opportunity to attend eligibility meetings.

Commenters also asked that § 300.501(b)(2) be amended to include in the definition of "meetings" those that occur via conference call or video conferencing, not just face-to-face meetings. Several comments advised that the language as proposed at § 300.501(b)(2) might result in parents being excluded from curriculum planning meetings for individual children under the guise of "teaching methodology, lesson plans or coordination of service provision" meetings. There were several recommendations that there be a specific timeline for giving parents notice of meetings, such as at least 10 business days before a meeting.

Regarding placements, many commenters stated that parents should be informed by public agencies of the various alternative placements available, not just the one ultimately chosen, and the reasons for rejecting the other potential placements. Further, it was suggested that the language in § 300.501(c)(1) be placed in the IEE section of the regulations.

Several commenters also stated that video-conferencing (referenced in § 300.501(c)(3)) would be costly and prohibitive for many schools. Some thought the language in § 300.501(c)(5), "whatever action is necessary", was too broad and should be a reasonable or feasible standard. There were also concerns that § 300.501(c)(5) should not require schools to ensure participation and comprehension by the parents, but that they should make reasonable attempts to ensure parents participate and understand.

Discussion: The statute specifically states that parents have the right to participate in meetings regarding identification, evaluation, placement or FAPE. Paragraph (b)(2) describes the types of discussions that do not fall within this requirement. The term "all" should be deleted to be consistent with the statutory language.

The term "all education records" is from the statutory reference to "all records relating to such child" at section 615(b)(1) of the Act. The Department has always interpreted the term to mean all of the child's education records to be consistent with the purpose of IDEA and the applicable confidentiality provisions of the General Education Provisions Act at 20 U.S.C. 1232g, also known as the Family Educational Rights and Privacy Act of 1974 (FERPA) as directed by section 617(c) of the Act.

Education records are defined at § 300.560 by reference to the definition of education records in 34 CFR part 99 (the regulations implementing FERPA). The term means those records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. Given the definition, it follows that tests taken by a child are included in the education records available for review by a parent. The discussion following § 300.562 in the attachment further discusses what is considered an education record of a child and the timelines for parental inspection and review of education records.

Regarding the definition of "meetings," the proposed definition was intended to make clear that parents have the right to be notified of and attend meetings which, generally, are scheduled in advance, and in which public agency personnel are to come together at the same time, whether face-to-face or via conference calls or video-conferencing, to discuss, and potentially resolve, any of the issues described in paragraph (b)(2).

Informal discussions among teachers and administrators, which may or may not be pre-arranged, are not meetings for which parents must receive notice and the opportunity to attend. Whether or not a meeting is prearranged is not the deciding factor in determining whether parents would have the right to attend; rather, the fact that the meeting is to discuss and potentially resolve one or more of the issues identified in paragraph (b)(2) triggers the parents' right to be involved.

In practical terms, this means that meetings to which the child's parents must be afforded the opportunity to attend cannot be convened without providing parents with reasonable notice. However, in the interest of regulating only where necessary, the first sentence of paragraph (b)(2) would be removed and no specific timeline regarding parental notice of meetings would be added.

The right of parents to participate in meetings where the provision of FAPE to their child is being discussed is statutory. The point of the provision is to ensure parents have the opportunity to participate in discussions where substantive decisions regarding their child's education are made—a key principle of the IDEA Amendments of 1997. Eligibility determinations are the focus of the identification process and are already part of § 300.501(a)(2). A parent's role in the eligibility determination also is addressed under § 300.534 of these regulations.

With respect to placement, if parents are to be meaningfully involved in the placement decision for their child it is necessary that they understand the various placement options. It is implicit in the requirement that parents be ensured the opportunity to be members of any group making the placement decision, that whatever placement options are available to a child will be fully discussed and analyzed at placement meetings, allowing input from all the participants.

Relocating the language at § 300.501(c)(1) in the IEE section of the regulations does not make sense since the purpose of § 300.501(c) is placement and that of IEE's is evaluation.

Whether or not video-conferencing, as well as other methods for enabling full participation in meetings by those with a right to attend, are used is dependent on the particular circumstances, and no one method is mandated. If one effective option would be more costly in a particular situation than another, there is no mandate that the more costly alternative be chosen.

Section 300.501(c)(4) explains that placement decisions may be made by public agencies without the parents if the agency is unable to obtain the parents' participation in the decision and documents its attempts to ensure their involvement. Once a parent makes clear that he or she will be involved in the placement decision-making process, § 300.501(c)(5) requires that the agency ensure that the parent is actually able to participate in, which includes understanding, the process. However, it is possible that even if an agency makes reasonable efforts, consistent with § 300.501(c)(5), to ensure a parent's participation, the parent is still not able to meaningfully participate. Thus, it appears useful to clarify the regulation.

Changes: Section 300.501(a)(2) has been amended to delete the word "all"; § 300.501(b)(2) (definitions of "meetings") has been amended by replacing "a prearranged event in which" with "when;" and deleting "and place;" and § 300.501(c)(5) has been revised to refer to reasonable efforts to ensure parent participation.

Independent Educational Evaluation (§ 300.502)

Comment: Some commenters thought that allowing the public agency to initiate a hearing regarding parental requests for independent educational evaluations (IEE), without allowing parents the right to likewise initiate a hearing, would cause excessive litigation. Further, it was suggested that States be required to develop clear criteria for acceptance of IEEs as the primary means of determining eligibility.

One commenter asked that a formula be established for reimbursing parents who assume the responsibility of establishing eligibility for their children. Several commenters urged that an IEE must be consistent with the requirements of a full and individual evaluation under §§ 300.530–300.536. It was also suggested that although the criteria under which an IEE is obtained at public expense should be the same as the criteria used by the public agency when it initiates an evaluation, reasonable travel should be allowed when community professional resources are limited.

A few comments requested limiting the cost of an IEE to a reasonable and customary charge, as well as restricting the type of evaluation conducted, such as evaluating only educational, not medical, needs.

Comments were received recommending that before a parent may request an IEE, there must have been an LEA evaluation, the results with which the parents disagree. The commenters stated that parents who refuse to consent to a public evaluation and then demand an IEE at public expense should not receive an IEE, unless they can demonstrate a legitimate reason for refusing to consent to the undertaking of a public evaluation.

Commenters both supported and opposed Notes 1 and 2, some wishing their deletion and some wanting them included as part of the regulations. Many commenters suggested that parents should explain why they disagreed with the public evaluation, or that the public agency should be able to request such information and have time to alleviate the parents' concerns, and that the parent should request a hearing if he or she wants one so the burden to demonstrate that the evaluation was appropriate would not fall solely on the public agency.

There were several requests for a definition of unnecessary delay in § 300.502(b), some proposing 10 calendar or school days from the receipt of a request for an IEE.

Discussion: The purpose of requiring the public agency to either initiate a due process hearing if it wishes to challenge a parent's request for an IEE, or otherwise provide an IEE at public expense, is to require public agencies to respond to IEE requests and to ensure parents are able to obtain an IEE as set forth in section 615(b)(1) of the Act. There is no corresponding need to specify that a parent also has the right to initiate a due process hearing since if a public agency does not do so it must provide the IEE at public expense.

IEEs would be only one element in the eligibility determination since the evaluation team reviews the existing evaluation data and then determines what additional data are needed to determine whether the child has or continues to have a covered disability, the child's present levels of performance and whether the child needs or continues to need special education and related services (see § 300.533(a) and (b)). Methods in addition to IEEs are to be used to determine whether a child is eligible under IDEA. Therefore, the results of IEEs cannot be the sole determining factor for eligibility.

Under IDEA, it is the public agency's responsibility to establish eligibility. If parents are willing to assume the responsibility, on behalf of the public agency, for having the assessment of their child under IDEA done, they should be reimbursed for the assessment methods agreed upon by the public agency and parents. The agreement between the parents and public agency would depend on their special circumstances so regulating on this issue would not be helpful. However, this procedure would not be an IEE.

Since § 300.502(e)(1) states that IEEs at public expense are to be conducted pursuant to the same criteria that apply to evaluations conducted by public agencies, it follows that the requirements at §§ 300.530–300.536 would apply to the IEEs. Note also that for an IEE obtained by a parent either at public or private expense to be considered by the public agency, such IEE must meet agency criteria. Therefore, the parents must be able to have access to the relevant agency criteria. To that end, Note 2 should be deleted and, in modified form, included in the text of the regulation at §§ 300.502(a)(2), 300.502(c)(1), and 300.502(e)(1).

There is nothing in the regulations with respect to IEEs, or evaluations in general, that would prevent reasonable travel for necessary services not available in the community.

Since public agencies must provide parents with information about where IEEs may be obtained, provided the options are consistent with §§ 300.530–300.536, public agencies have some discretion in the cost if it is at public expense. Further, evaluations of children under IDEA are to cover all areas of suspected disability, which may include medical examinations for purposes of determining the child's disability. There may be situations in which a child's educational needs are intertwined with a child's health needs, therefore, stating that the types of evaluations conducted are only those regarding educational need does not add any useful clarity.

The right of a parent to obtain an IEE is triggered if the parent disagrees with a public initiated evaluation. Therefore, if a parent refuses to consent to a proposed public evaluation in the first place, then an IEE at public expense would not be available since there would be no public evaluation with which the parent can disagree. If the parent believes the proposed public evaluation is inappropriate, he or she may pursue an appropriate publicly-funded evaluation via the mediation or due process procedures under §§ 300.506–300.509.

With respect to Note 1, while it would be helpful for parents to explain their disagreement over a public evaluation, there is nothing in the statute which prevents parents from obtaining an IEE if they did not express their concerns first. Therefore, Note 1 would be deleted and the regulation changed to state that the public agency may request an explanation from the parents regarding their concerns when the parent files a request for an IEE at public expense. However, such an explanation may not be required of the parents and the provision of an IEE, or initiation of a due process hearing to defend the public evaluation, may not be delayed unreasonably regardless of whether or not the parent explains his or her concerns to the public agency.

Since the necessity or reasonableness of a delay is case specific, no definition of these terms has been added.

Changes: Note 2 has been deleted and § 300.502(a)(2) and (e)(1) have been amended to provide that on request for an IEE, parents are provided with information about where an IEE may be obtained and the agency criteria applicable to IEEs and that those criteria are consistent with the parent's right to an IEE.

Note 1 has been deleted and § 300.502(b) has been revised to explain that an explanation of parent disagreement with an agency evaluation may not be required and the public agency may not delay either providing the IEE at public expense or, alternatively, initiating a due process hearing.

Prior Notice by the Public Agency; Content of Notice (§ 300.503)

Comment: One commenter stated that § 300.503(b)(8) should be removed, believing it to exceed the statute and because an explanation of State complaint procedures is given in the procedural safeguards notice. The commenter also believed it is inconsistent to inform parents about the State complaint process without the other two (mediation and due process appeals) being explained.

Several commenters asked for specific types of organizations to be listed in § 300.503(b)(7), such as parent training institutes. Another commenter wanted the title of § 300.503 to be changed to "Prior Notice by the Public Agency Before Implementing an IEP."

Several commenters asked that a note be added to explain when the notice needs to be sent.

Requests were received to delete § 300.503(b)(6) and to insert the phrase "unless it is clearly not feasible to do so" as stated in § 300.503(c)(ii) whenever language or mode of communication is addressed. It was also suggested that a note be added that an LEA must document its attempts at accessing resources to assist in translating or interpreting information.

Discussion: Section 300.503(b)(8) was proposed to enhance the awareness of parents of low cost and less adversarial mechanisms for resolving disputes with school districts. Therefore, it makes sense to require State complaint procedures to be explained along with due process and mediation rather than in this notice. Since § 300.503(b)(6) requires that parents be advised of the existence of procedural safeguards and, if the written notice is not part of an initial referral for an evaluation, be told how a copy of the procedural safeguards notice can be obtained, it would be useful and appropriate to add a specific requirement for an explanation of the State complaint process in § 300.504(b).

Procedural safeguard notices must be given to the parents, at a minimum, upon the four events set forth at § 300.504(a); between those events and the statement mandated at § 300.503(b)(6), agencies should have ample instances in which they must provide parents with effective notice of the various processes for challenging proposed action. Therefore, § 300.503(b)(8) should be deleted and moved to § 300.504(b).

The types of organizations which exist to help parents understand IDEA are varied and depend on the particular State. Therefore, a list of such organizations in the regulations would not be feasible.

The regulation is already clear on when the prior written notice must be given: a reasonable time before the public agency proposes or refuses to initiate or change the child's identification, evaluation, educational placement or provision of FAPE. If parental consent is required for the proposed action, the notice may be given when parental consent is requested. Further, the notice is required at times other than only before implementing a child's IEP so the title should not be changed.

Section 300.503(b)(6) is taken directly from the statute. In addition, it is difficult to understand when it would not be feasible to add the statement required by § 300.503(b)(6).

It is not necessary to add a note requiring an agency to document its efforts to translate or interpret the notice pursuant to § 300.503(c)(2)(i) and (ii) since § 300.503(c)(2)(iii) requires that the agency can show that § 300.503(c)(2)(i) and (ii) have been met.

Changes: Section 300.503(b)(8) has been deleted and moved to § 300.504(b).

Procedural Safeguards Notice (§ 300.504)

Comment: Several commenters were opposed to specifying the times procedural safeguards notice are to be given to the parents, claiming such requirements are expensive and burdensome. One commenter asked that the terms "opportunity to present complaints" and "due process hearings" be clarified since the two terms seem to mean the same thing for purposes of the procedural safeguards notice. Other commenters objected to §§ 300.504(a)(2), 300.504(b)(7), and 300.507(c)(2)(iii).

There were several suggested additions to the timing and contents of the procedural safeguards notice. Commenters suggested that the procedural safeguards notice: (1) Also be required when there is a decision to remove a child from his or her current educational placement for disciplinary actions resulting from behaviors described in § 300.520 or § 300.521, or for a period of more than 10 school days for other violations; (2) contain information with respect to the transfer of rights at the age of majority and the circumstances under which tuition reimbursement may be denied; (3) contain information on the use of private and public insurance to pay for Part B services; (4) contain information as to where parents can receive help in understanding procedural safeguards; (5) state that a public agency may not deny a parent's right to a due process hearing if the parent fails to participate in a meeting to encourage mediation; and (6) include a complete listing of all times when the safeguards notice is to be provided.

Discussion: The minimum times the procedural safeguards notice must be given to parents is set forth in the statute at section 615(d)(1). The fourth requirement, that the notice be given upon receipt of request for a due process hearing, comes from the requirement at section 615(d)(1)(C) that the notice be given upon registration of a complaint under section 615(b)(6).

The longstanding interpretation of the statutory mandate at section 615(b)(6) that parents have the opportunity to present complaints relating to their child's identification, evaluation, educational placement and provision of FAPE, is that they have an opportunity to request a due process hearing. Therefore, § 300.504(b)(5) should be modified to make clear that the opportunity to be explained is that of presenting complaints to initiate due process hearings pursuant to § 300.507. Section 300.504(b)(10) as stated is then clearer in that it refers to an explanation of the actual due process hearing procedures. Also, in adding § 300.504(b)(14), a corresponding change to the first paragraph of § 300.504(b) must be made to reference State complaint process.

Sections 300.504(a)(2) and (b)(7) are required by the statute. The provision in § 300.504(c)(2)(iii) has been in the regulations since 1977 and there is no basis for changing the requirement given that purpose is to ensure that parents receive assistance in understanding the notice.

Regarding the several suggested additions to the timing and contents of the procedural safeguards: (1) § 300.504(b)(7) as written addresses situations where children are disciplined and placed in interim alternative educational placements; (2) § 300.504(b)(8) as written addresses situations resulting in reduction of reimbursement of private school tuition; (3) § 300.347(c) requires that at least one year before the student reaches the age of majority under State law the parents and the student will receive notice of the projected transfer of rights through the IEP; (4) § 300.142(e) specifies that private insurance can only be used with informed parent consent and that public insurance can only be used if it will not result in a cost to parents; (5) § 300.503(b)(7) already includes sources for parents to use to help in understanding their rights; and (6) § 300.504(b)(9) already requires that the mediation process, which includes parental rights therein, be fully explained.

The information on the content and timing of the procedural safeguards notice is not included in the statutory description of the contents of this notice.

Changes: As discussed under § 300.503, a new § 300.504(b)(14) has been added to address State complaint procedures. The first paragraph of § 300.504(b) is amended to recognize this change. Section 300.504(b)(5) is amended to refer to presenting complaints to initiate due process hearings.

Parental Consent (§ 300.505)

Comment: A few comments suggested that the term "informed" be inserted before "parental consent" in § 300.505(a)(1).

Several commenters believe that parental consent should be required for all reevaluations, not just those where new tests are necessary. Other commenters also requested that the term "new test" be changed to encompass other evaluation procedures. Others stated that the term "new test" confused rather than clarified when consent needed to be obtained and requested that it be clarified or deleted. Some commenters suggested that an explanation be added to clarify that where additional data are needed in order to reevaluate a child, parental consent is required. There were also questions regarding the necessity of consent for adapted or modified assessments if not part of a reevaluation, such as ongoing classroom evaluations (e.g. the Brigance) and counseling.

Several commenters believe that parental consent should be required before special education services are discontinued, for example, upon graduation. A few commenters recommended that reevaluations for children who are suspended for more than 10 days or expelled should be able to proceed even if parental consent is not given.

The use of § 300.345(d) procedures to meet the reasonable measures requirement of § 300.505(c) was opposed by some commenters, several of whom believe that documenting efforts to obtain parental consent should be sufficient. Some also wanted reasonable measures to be defined more specifically.

Several comments advocated deleting Note 3 and others believed Note 3 should be incorporated into the regulation. Further, it was recommended that the clarification in Note 2 be revised to state that the public agency consider implementing its procedures to override a parent's refusal to consent to services the public agency believes are necessary for the child to receive FAPE, rather than requiring the public agency to implement such override procedures.

Discussion: Parental consent must be informed to be consistent with the statute and meaningful. Further, adding the word "informed" at § 300.505(a)(1) is consistent with the definition, in § 300.500(b)(1), of consent.

In order for children to receive FAPE, the IDEA Amendments of 1997 emphasized the importance of parent involvement in their children's evaluation and placement. The statute requires informed parental consent prior to a child's initial evaluation for special education and related services, as well as any reevaluations. The intent of this statutory change was not to require school districts to obtain parental consent before reviewing existing data about the child and the child's performance, an activity that school districts, as a matter of good practice, should be engaged in as an on-going practice.

To require parental consent for collection of this type of information would impose a significant burden on school districts with little discernable benefit to the children served under these regulations. The statute provides that in some instances, an evaluation team may determine that additional data are not needed for an evaluation or reevaluation. In all instances, parents have the opportunity to be part of the team which makes that determination. Therefore, no parental consent is necessary if no additional data are needed to conduct the evaluation or reevaluation.

To make this clear and to respond to commenters who believed that requiring parental consent only when conducting a new test as part of the reevaluation was too narrow, the regulation should be revised to specify that parental consent must be obtained before conducting an evaluation or reevaluation, to delete proposed paragraph (a)(1)(iii) and add a new provision to state that parental consent need not be obtained before reviewing existing data as a part of an evaluation or reevaluation or before administering a test or other evaluation that is administered to all children unless consent is required of all parents.

Parental consent would be necessary if a test is conducted as a part of an evaluation or reevaluation, and when any assessment instrument is administered as part of an evaluation or reevaluation. However, schools would not be required by these regulations to obtain parental consent for teacher and related service provider observations, ongoing classroom evaluation, or the administration of or review of the results of adapted or modified assessments that are administered to all children in a class, grade, or school.

If a child is about to graduate or otherwise stop receiving special education and related services, § 300.503's prior notice requirements would be triggered. Section 300.503 requires that written notice must be sent to the parents before a proposed change in identification, evaluation, placement, or the provision of FAPE is effective, thereby allowing the parent the opportunity to object to the proposal. It is not appropriate to regulate further on this issue here.

Paragraph (b) of this section addresses the procedures an agency can use if it wants to pursue an evaluation or reevaluation, but the parents have refused consent. The agency may seek to do the evaluation or reevaluation by using the due process or mediation procedures under Part B of the Act unless doing so would be inconsistent with State law relating to parent consent. Proposed Notes 1 and 3, and the second part of proposed Note 2 were attempts to clarify the interplay between the Federal requirement to provide FAPE and any State laws and policies which may not permit educational agencies to override refusals of parents to consent to evaluations and reevaluations.

In practical terms, if a State does not allow the agency to override a parent's refusal for an initial evaluation or reevaluation which the agency deems necessary in order to provide FAPE, the agency, under paragraph (b), must follow the requirements of State law. In cases where the evaluation or reevaluation is necessary in order to determine that the child is or continues to be a child with a disability under Part B of the Act, and State law prohibits an agency from overriding a parental refusal to consent, the agency may have no recourse but to not provide, or not continue to provide, services under the Act to the child.

On the other hand, if State law does not prohibit the agency from overriding a parental refusal to consent to an evaluation or reevaluation, and the agency believes that an evaluation or reevaluation is necessary in order to provide FAPE, the agency would have to take appropriate action.

If State law provided a mechanism different than due process or mediation under Part B as the means to override a parent refusal of consent, and the agency deems the evaluation or reevaluation necessary in order to provide FAPE, the agency would use the State mechanism to pursue the evaluation. If State law permits agencies to override a parental refusal to consent to an evaluation or reevaluation, but does not specify the procedures to use, and the agency determines that the evaluation or reevaluation was necessary in order to provide FAPE to the child, the agency would use the due process and mediation procedures under Part B of the Act.

Of course, if an agency proposed an evaluation or reevaluation and the parent refused consent, the agency could reconsider whether its proposed evaluation or reevaluation was necessary, if the circumstances warrant. However, in light of the general decision to remove all notes from the regulations implementing Part B of the Act, the notes should be removed.

Paragraph (c) of this section addresses situations in which an agency seeks parental consent for a reevaluation, but the parent fails to respond. Given the importance of parental involvement, the procedures a public agency must use to demonstrate that it has taken reasonable measures to obtain parental consent pursuant to § 300.505(d) should be consistent with the procedures in § 300.345(d) that a public agency must use to inform and encourage parents to attend IEP meetings. The methods described in § 300.345(d) are examples of how to attempt and document the steps that the public agency has taken to obtain parental participation in an IEP meeting, and are applicable to a public agency's attempts to obtain parental consent pursuant to 34 CFR 300.505.

Section 300.345(d) does not require a public agency to take all of the steps mentioned before conducting the meeting. A public agency may use a method which is different from the ones listed at § 300.345(d) to demonstrate that it has attempted to obtain parental consent as long as it can demonstrate that its methods were appropriate. Therefore, the language concerning the use of the § 300.345(d) procedures to meet the reasonable measure requirement of § 300.505(c) should be retained.

Under paragraph (d) of this section if a State adopts consent requirements in addition to those required in § 300.505(a)(1), public agencies are not excused from their obligation to provide FAPE because a parent refuses to consent unless the public agency has taken the steps necessary to resolve the matter. In order to resolve the disagreement with the parent, it is appropriate for the public agency to use informal means initially, such as a parent conference. However, if these informal means prove unsuccessful, the public agency must use its override procedures if it continues to believe that the disputed service or activity is needed in order for the child to receive FAPE.

Paragraph (e) of this section contained a typographical error because it should have referred to consent required under paragraphs (a) and (d), consistent with the prior regulations. With regard to paragraph (e), it is important to recognize that except for the service or activity for which consent is required under paragraphs (a) and (d), parent refusal to consent to one service or benefit may not be used to deny the parent or child any other service or benefit available to them. For example, if a State requires parental consent to the provision of all services identified in the IEP, and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents. Similarly, a parent refusal to consent to a reevaluation may not be used to deny a child the right to participate in a class trip. A parent refusal to consent to the collection of additional data that a public agency believes is needed as a part of a reevaluation may not be used to deny the child the services that are not in dispute. In addition, a parent refusal to consent to the collection of additional data that the agency thinks necessary to determine whether the child continues to be a child with a disability may not result in the exclusion of the child from special education and related services because § 300.534(c)(1), which reflects the statutory requirements of section 614(c)(5), requires a full evaluation before determining that a child is no longer a child with a disability. To make this point more clearly, paragraph (e) would be revised.

Changes: Section 300.505(a)(1) has been amended to refer to "informed parent consent," and to delete the unnecessary reference to programs providing special education and related services. A reference to reevaluation has been added to paragraph (a)(1)(i), paragraph (a)(1)(iii) has been deleted, and a new paragraph (a)(3) added to specify that parental consent is not required before reviewing existing evaluation data as a part of an evaluation or reevaluation or for administering a test used with all children unless consent is required of all parents. Paragraph (e) has been revised to provide that a public agency may not use a parental refusal to consent to one service or benefit under paragraphs (a) and (d) to deny the parent or child another service, benefit, or activity, except as may be required by these regulations. The notes following this section have been removed.

Mediation (§ 300.506)

Comment: Several commenters asked that the terms "SEA" and "LEA" be used in lieu of "public agency" since the statute uses those terms. There were also requests for a clarification of the State's responsibility for the costs of the mediation process.

There were a few requests for clarification of who may be mediators, such as whether or not former LEA employees would be able to be mediators. There were comments asking for more restrictions on who could be a mediator and comments asking for fewer restrictions, especially where a public school district already has certain mediators under state law or regulation. The latter commenters believe the restrictions should only address employees of an agency that is providing direct services to a child who is the subject of the mediation or any state agency described in § 300.20.

There was also the suggestion that LEA employees be permitted to serve as mediators, however, either party would have the right to reject such selection. The commenters pointed out that there is no similar prohibition against LEA employees being hearing officers and several questioned whether the restrictions were therefore necessary. Some commenters suggested that the regulation make clear that multiple mediators or mediation panels are allowed, i.e., that a single mediator is not required for each mediation.

Other comments recommended that Note 1 be deleted, while others asked that it be included in the text of the regulation. With regard to Note 1, for situations in which agreement on a mediator could not be reached, commenters sought additional guidance in the regulation.

Other suggestions for the mediation process included promoting mediation even before a due process hearing is requested and allowing an LEA to select a mediator who it believes is best able to resolve issues in dispute. There were comments that mediation should be allowed to occur via telephone when necessary. Several commenters asked that the agreement reached in mediation be added to the child's IEP as soon as possible after the agreement is reached, however not later than 10 days from the agreement. Commenters also requested that the regulation specify that the written mediation agreement would be as enforceable as a due process hearing decision, and that mediation discussions may be disclosed in any proceeding brought to enforce a mediation agreement.

Some comments stated that there appeared to be a conflict between §§ 300.506(d)(1) and 300.506(d)(2). The former allows a public agency to require parents who elect not to go to mediation to meet with a disinterested party to learn about the mediation process. The latter states that if a parent does not participate in the informational meeting regarding mediation the public agency may not deny or delay the parent's right to due process hearing. The comments suggested changing § 300.506(d)(1) to state that the procedures may "request" not "require" the parents to learn about mediation. A few comments requested a specific definition of the term "disinterested party" and parent information and training centers, as well as clarification of any supervision required over disinterested parties. There were also comments which asked that LEAs be required to mediate if the parents agree, as well as be required to attend a mediation informational meeting if it chooses not to mediate.

Discussion: Mediation is an important alternative system for resolution of disputes under Part B. However, in order for mediation to be effective, it must be an attractive alternative to both public agencies and parents and it must be an impartial system which brings the proper parties into a confidential discussion of the issues and allows for a binding agreement that resolves the dispute.

The statute clearly states that the option of mediation must be available whenever a due process hearing is requested. No further requirement would be added to the regulations. However, States or other public agencies are strongly encouraged to offer mediation or other alternative systems of dispute resolution prior to the filing of a request for a due process hearing, and whenever a dispute arises.

An expanded use of mediation should enable prompt resolution of disputes and lead to a decrease in the use of costly and divisive due process proceedings and civil litigation. Mediation may also be useful in resolving State complaints under §§ 300.660–300.662.

The term "public agency" in the regulation appropriately includes State and local educational agencies as well as other agencies in the State that may have responsibility for the education of children with disabilities because it ensures access to the mediation process, regardless of the agency that provides educational services. The requirement that the State bear the cost of the mediation process is clearly set out in the regulation; however, the regulation should be revised to correctly refer to the meetings to encourage the use of mediation. In addition, the potential savings of mediation, when compared to litigation, make it an attractive, low-cost option for most public agencies.

While there is nothing in the Part B regulations that precludes parents and LEA employees from attempting to resolve disputes through an informal process, the use of current LEA employees as mediators would make mediation a much less attractive alternative to parents. The regulatory provisions regarding the impartiality of mediators and the requirement of specialized expertise in laws and regulations relating to the provision of special education and related services are intended to be more stringent than the Federal requirements for impartial hearing officers to ensure that mediation is a more attractive option for parents, and an effective option for both parties. The use of a single mediator in the mediation process is important for clear communication and accountability.

Paragraph (b)(1)(iii) of this section, which repeats statutory language, is clear that each mediation be conducted by one mediator, as opposed to a panel or multiple mediators.

Another factor that will determine the success of mediation within a State is the selection process for mediators. It is important to note that with respect to paragraph (b)(2) of this section, the Senate and House Committee Reports on Pub. L. 105-17 include the following statement:

> * * * the bill provides that the State shall maintain a list of individuals who are qualified mediators. The Committee intends that whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected. (S. Rep. No. 105-17, p. 27 (1997); H. Rep. No. 105-95, p. 106 (1997).)

The success of a mediation system will be closely related to both parties' trust and commitment to the process. The first test of that process will be the selection of the mediator. Parties that mistrust the mediator selection process may be less likely to reach agreement on substantive issues. Therefore, reflecting the language of the Committees' reports on this topic, a change should be made to the regulation to specify that if a mediator is not selected on a random basis from the State-maintained list, both parties are involved in selecting the mediator and are in agreement with the selection of the individual who will mediate.

Like hearing officers, mediators must be able to be paid by the State, without impacting their impartiality. Language similar to that used for impartial hearing officers should be added to the regulation to clarify that even though a mediator is paid for his or her services as a mediator, such payment does not make that mediator an employee for purposes of impartiality.

The regulatory requirement for the use of a qualified mediator instructed in effective mediation techniques will ensure that decisions about the effectiveness of specific techniques, such as the need for face-to-face negotiations, telephone communications, or IEP implementation provisions, will be based upon the mediator's independent judgment and expertise. Therefore, it is not necessary to regulate on these issues.

The enforceability of a mediation agreement, like the enforceability of other binding agreements, including settlement agreements, will be based upon applicable State and Federal law. With regard to the provision in paragraph (b)(6) of this section that mediation discussions must be confidential and may not be used in any subsequent due process hearings or civil proceedings, the Senate and House Committee Reports on Pub. L. 105-17 note that "nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to the parties." (S. Rep. No. 105-17, p. 27 (1997); H. Rep. No. 105-95, p. 107 (1997)). The Reports also include an example of a confidentiality pledge, which makes clear that the intent of this provision is to protect discussions that occur in the mediation process from use in subsequent due process hearings and civil proceedings under the Act, and not to exempt from discovery, because it was disclosed during mediation, information that otherwise would be subject to discovery.

Regarding the perceived conflict between § 300.506(d)(1) and (d)(2), the mediation process, including meetings to discuss the benefits of mediation, should not be used to deny or delay parents' due process hearing rights. The purpose behind § 300.506(d)(2) is to ensure that in situations where parents are unwilling or unable to cooperate with a public agency regarding a meeting to discuss the benefits of mediation, there is still a timely resolution of the due process hearing. In general, a hearing officer should not extend the timelines for a due process hearing based on the fact that there is a pending mediation in the case unless both parties have agreed to that extension. If mediation is used in the resolution of a State complaint, it should not be viewed as creating, in and of itself, an exceptional circumstance justifying an extension of the 60 day time line. While the State or local educational agency may require that the parent attend the meeting to receive an explanation of the benefits of mediation and to encourage its use, a parent's failure to attend this meeting prior to the due process hearing should not be used to justify delay or denial of the hearing or the hearing decision.

It is not necessary to define the terms "parent training and information centers" or "community parent resource center" since they are established by statute. To allow flexibility with regard to the designation of a "disinterested party" by the parent organizations or an appropriate alternative dispute resolution entity, no definition would be provided. Consistent with the general decision to remove all notes from these final regulations, Notes 1 and 2 would be removed.

Changes: A new paragraph (b)(2)(ii) is added to specify that the mediator be selected from the list on a random basis, such as a rotation, or that both parties are involved in selecting the mediator and agree with the selection of the individual who will mediate. Notes 1 and 2 have been removed. Paragraph (b)(3) has been revised to refer to the meetings to encourage the use of mediation.

Another new paragraph (c)(2) is added to clarify that payment for mediator services does not make the mediator an employee for purposes of impartiality.

Impartial Due Process Hearing; Parent Notice (§ 300.507)

Comment: There were several comments requesting changes to § 300.507. With regard to the model form for hearing requests, some commenters requested that where the public agency requests the due process hearing, the public agency would provide the notice requested of the parents at § 300.507(c)(1) and (c)(2). Others requested that parent information and training centers and the general public be required to assist in developing the model form required in § 300.507(a)(3).

The Department also received comments asking that § 300.507(c)(4) be modified so that LEAs can ask a hearing officer to delay a due process hearing for a reasonable period of time until the parents provide the district with the required pre-hearing notice. Some commenters suggested that parents be informed of free and low cost legal advocacy as a matter of routine, not just after requesting a due process hearing. Other commenters sought additional language specifying that LEAs be barred from coming to a due process hearing with a new IEP developed without direct parental input and based on the information given by the parents in the hearing request.

Commenters also requested that the statutory provisions regarding attorneys' fees at sections 615(i)(3)(D) and (F) of the Act be included in this regulation. Others requested that the term "or refusal to initiate or change" be added to § 300.507(c)(2)(iv).

Some commenters asked that the Department delete Note 1, while others asked that Note 1 be written into the regulation itself.

Discussion: The prior written notice requirement of § 300.503 is sufficient to inform parents of what the public agency is proposing. Therefore, any hearing request by the public agency on that proposal would not require an additional notice by the agency. Another notice would be repetitive and overly burdensome. Likewise, many public agencies already have existing model forms for hearing requests. Since the statute and regulation specify the information which parents must disclose in the hearing request, additional input from parent information and training centers or the general public is unnecessary and would create additional burdens without much benefit.

The Senate and House Committee Reports on Pub. L. 105-17 note that attorneys' fees to prevailing parents may be reduced if the attorney representing the parents did not provide the public agency with specific information about the child and the basis of the dispute described in paragraphs (c)(1) and (2) of this section. With respect to the intent of the new notice provision, the Reports include the following statement:

> * * * The Committee believes that the addition of this provision will facilitate an early opportunity for schools and parents to develop a common frame of reference about problems and potential problems that may remove the need to proceed to due process and instead foster a partnership to resolve problems. (S. Rep. No. 105-17, p. 25 (1997); H. R. Rep. No. 105-95, p. 105 (1997)).

The changes to § 300.513 clarify the potential for reduction of attorneys' fees in cases where proper notice is not given by the parents' attorney. Therefore, a reference to attorneys' fees is not necessary here.

Matters such as what evidence should and should not be presented and requests for extensions of time, should be handled on a case-by-case basis by the impartial hearing officer presiding over the hearing. It has also been the Department's long-standing position that Part B of the Act and the regulations under Part B do not provide any authority for a public agency to deny a parent's request for an impartial due process hearing, even if the agency believes that the parent's issues are not new. Thus, the determination of whether or not a parent's request for a hearing is based on new issues can only be made by an impartial hearing officer.

The request for modification of the regulation at § 300.507(c)(2)(iv) to include situations where the nature of the problem is the public agency's refusal to initiate or change the provision of a free appropriate public education, is consistent with the requirements of § 300.507(a)(1). In light of the general decision to remove all notes from these final regulations, Notes 1 and 2 should be removed.

Changes: Section 300.507(c)(2)(iv) is amended to make clear that a problem may have arisen as a result of an agency's proposal or refusal to act. Notes 1 and 2 have been removed.

Impartial Hearing Officer (§ 300.508)

Comment: The Department received several comments requesting amendments to the regulation on hearing officers in two main aspects—qualifications and public notice of such qualifications. In the first area, commenters stated that persons who are employees of any LEA, persons who were employees of an SEA or LEA and were involved in the care or education of any child in the past 5 years, and attorneys who represent primarily the school district or parents cannot be hearing officers. In the second area, commenters requested that hearing officers be required to take training and competency examinations designed by this Department and supplemented with State-specific elements. Several commenters also want SEAs to publish the criteria they use to choose hearing officers and that the list of all the hearing officers and their credentials be provided to parents requesting a due process hearing. Commenters also suggested that the regulation require that if a sublist of hearing officers is generated for a particular hearing, the parents or their representative be present at the meetings where the sublist is selected. Further, commenters asked that the statement of the qualifications of hearing officers be updated annually and the impartiality of a hearing officer be determined by an objective standard, such as a State's Code of Judicial Conduct.

Discussion: The regulation, in conjunction with State ethics requirements for attorneys and judges, are sufficient to address the concerns raised by commenters with regard to potential conflicts. In States where there are no formal ethical standards for administrative hearing officers, the issue should be addressed within the State. A prior employee of an LEA or SEA should not be barred from serving as a hearing officer where there is no personal or professional interest that would conflict with his or her objectivity in the hearing. Hearing officers, like judges, are capable of making independent determinations of potential conflicts of interest, including a determination of whether he or she has knowledge or information about a particular child derived from outside the hearing process which would impact upon his or her impartiality.

Although numerous commenters asked for national standards, training, and examinations for impartial hearing officers, decisions about training and hearing officer selection, including the use of sublists, should be left to States. Since hearing officers' decisions are subject to judicial review, there is a strong incentive for States to choose qualified hearing officers, conduct appropriate training and establish standards of expertise. Hearing decisions that are not soundly decided will lead to further litigation, be more likely to be reversed and create higher costs. In addition, reviewing courts are less likely to give judicial deference to a hearing officer where his or her qualifications show no expertise in the area of special education.

Changes: None.

Hearing Rights (§ 300.509)

Comment: There were several specific comments regarding hearing rights. With respect to the additional disclosure of information, some commenters stated that the time frame should be 5 school days, not business days, prior to a hearing, and the recommendations should be clarified as written recommendations which may be summaries of oral recommendations. A few commenters also suggested that § 300.509(a)(3) and (b) use the same standard of business days to avoid confusion.

With respect to the parental hearing rights, some commenters suggested that since it sometimes not in the interest of the child to be present at the hearing, the parents should have the right to have the child who is the subject of the hearing present for only a portion of the hearing. There were also comments that a free written record is too expensive for States to provide, as well as comments that a verbatim recording should be at no cost to the parents.

With respect to general hearing rights, commenters asked that evidence that has not been disclosed within the appropriate time frame not be allowed unless agreed to by both parties or for good cause shown for the failure to disclose in advance. Commenters also asked that the regulations state that the only pre-hearing discovery allowed is the exchange of information set forth in § 300.509. Finally, commenters requested that hearing decisions be made available to the public at least on a quarterly basis.

Discussion: The establishment of two separate time frames for the prehearing disclosure of documents because the term "5 business days" is used in § 300.509(b)(1) and the term "5 days" is used in paragraph (a)(3) of this section will lead to confusion and additional litigation and costs. In order to prevent this, the time frame for disclosure would be set to 5 business days prior to the hearing. This change would be consistent with prior interpretations by the Department, which recognized that the intent of prehearing disclosure is to avoid surprise by either party at the hearing. The hearing officer has discretion to determine the consequences of not meeting the disclosure time line, and may prohibit the introduction of the evidence or may allow the rescheduling of the hearing so that timely disclosure is possible.

Some States chose to allow the use of other discovery procedures prior to a due process hearing. States should continue to have this discretion as they are not prohibited from doing so by Part B.

Access to a written verbatim record of the hearing is vital for parents to exercise their full due process rights. Although there are costs associated with the statutorily mandated shift of the choice between an electronic or written record of the hearing from the public agency, as newer technologies are better capable of generating accurate transcriptions, these costs will decrease.

Parents must continue to have the choice to have the child be present for all or part of the hearing, at their discretion. For some youth with disabilities, observing and even participating in the hearing will be a self-empowering experience in which they can learn to advocate for themselves. This long-standing choice should not be taken away from parents. This choice takes on added significance in light of the new provisions that allow States to transfer parental rights to students at the age of majority. Under this new authority, there may be more situations where students will have to be present at and participate in due process hearings.

Implicit in the requirement that hearing decisions be made available to the public, is the requirement that they be made available within a reasonable amount of time. Therefore, no specific time requirement is needed in the regulation.

Changes: Paragraph (a)(3) of this section is changed to require disclosure at least 5 business days before the hearing.

Finality of Decision; Appeal; Impartial Review (§ 300.510)

Comment: Several comments regarding the availability of SEA hearing decisions, asked that such decisions be distributed directly to various organizations and allow parents to receive the findings under § 300.510(b)(2)(vi) in an electronic format. Other comments requested that hearing officers be allowed to amend decisions once they are final to correct for technical errors, similar to Rule 60 of the Federal Rules of Civil Procedure.

One commenter asked that Notes 1 and 2 be incorporated into the regulation itself and several commenters pointed out that the reference in § 300.510(b)(2)(iii) should be to § 300.509 not § 300.508.

Discussion: There were two typographical errors in the proposed regulation with respect to references to other sections. In § 300.510(b)(2)(iii) the reference to § 300.508 should be to § 300.509 consistent with the prior regulatory reference. In § 300.510(d), the reference to § 300.511 should be to § 300.512, also consistent with the prior regulatory reference.

The reference in § 300.510(b)(vi) to written findings and decision should be changed to be consistent with § 300.509(a)(5) and allow the choice of electronic or written findings of fact and decision.

It is not necessary to regulate on whether hearing officers are allowed to amend their decisions for technical errors. This matter is left to the discretion of hearing officers and States; however, proper notice should be given to parents if State procedures allow for amendments and a reconsideration process may not delay or deny parents' right to a decision within the time periods specified for hearings and appeals.

It has been the Department's position that the SEA may conduct its review either directly or through another State agency acting on its behalf. However, the SEA remains responsible for the final decision on review. In addition, all parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in § 300.509 relating to hearings also apply. However, in light of the general decision to remove all notes from these final regulations, Notes 1 and 2 would be removed.

Changes: In § 300.510(b)(2)(iii) the reference to § 300.508 has been changed to § 300.509. In § 300.510(d), the reference to § 300.511 has been changed to § 300.512. The reference in § 300.510(b)(2)(vi) to written findings and decision has been changed to be consistent with § 300.509(a)(5) and allow the choice of "electronic or written findings of fact and decision." Notes 1 and 2 have been removed.

Timelines and Convenience of Hearings and reviews (§ 300.511)

Comment: A few comments were received regarding § 300.511 which requested that (1) the 45 and 30 day timelines be specified as 45 and 30 school days; (2) it be clear that hearing officers have discretion to deny requests for extensions of time since extensions may delay hearings for a long time; and (3) delete § 300.511(a) or change it to make the SEA responsible for timelines.

Discussion: There is not sufficient consensus or evidence of need to change the long-standing interpretation of the hearing and review timelines from calendar days to "school days." In addition, the potential impact of no "school days" during the summer months would make the delay in parents' access to due process hearings and decisions unreasonable.

The use of the word "may" instead of "shall" in § 300.511(c), means that the granting of specific extensions of time are at the discretion of the hearing or review officer. It is not necessary to clarify that this discretion means that requests for extensions can be denied as well as granted since this is implicit in the regulation.

There is no need to change the regulation to reflect the State's responsibility for compliance with timelines because in addition to the language in this regulation, § 300.600 continues to hold the State ultimately responsible for noncompliance.

Changes: None.

Civil Action (§ 300.512)

Comment: A commenter pointed out that § 300.512 had a few typographical errors since the reference to § 300.510(b)(2) should be to § 300.510(b)(1) and the reference to § 300.510(e) should be to § 300.510(b).

Discussion: There were typographical errors in this section in the NPRM, however the reference to § 300.510(b)(2) should be to § 300.510(b) and the reference to § 300.510(e) should be to § 300.510(b).

Changes: The reference to § 300.510(b)(2) has been changed to § 300.510(b) and the reference to § 300.510(e) has been changed to § 300.510(b).

Attorneys' Fees (§ 300.513)

Comment: Many commenters requested that § 300.513 include the provisions from sections 615(i)(3)(D) and (F) of the Act regarding instances where attorneys fees are prohibited or may be reduced. Several commenters also asked that a note be added to state that attorneys' fees may be awarded if an IEP team meeting occurs after a hearing request but before the hearing.

Several commenters requested that the note on hearing officers be deleted, stating that the awarding of attorneys' fees should be left to the courts. One commenter stated that if hearing officers are allowed to award attorneys' fees, they should be trained in, and use, the criteria used by Federal courts in determining attorneys' fees.

One commenter also asked that § 300.513(b) be deleted.

Discussion: By inserting all the statutory provisions regarding attorneys' fees into the regulations, most of the suggestions will be adequately addressed and additional clarity will be added.

Based upon the absence of consensus, the Department will continue to allow maximum flexibility to States for structuring the process by which parents who are prevailing parties under Part B of the Act may request attorneys' fees reimbursement.

It is important to maintain paragraph (b)(1) of this section, because the limited Federal resources under the Act should be used to provide special education and related services and not be used to promote litigation of disputes. Further, that paragraph has been modified to make it clear that the prohibition against using Part B funds for attorney's fees also applies to the related costs of a party in an action or proceeding, such as depositions, expert witnesses, settlements, and other related costs. In addition, a new paragraph (b)(2) of this section has been added to clarify that the prohibition in paragraph (b)(1) does not preclude a public agency from using funds under Part B of the Act to conduct an action or preceding under section 615 of the Act, such as the cost of paying a hearing officer and providing the place for conducting the action or proceeding.

In light of the general decision to remove all notes from the final regulations under the Act, the note following this section in the NPRM would be removed. The proposed note was merely intended to suggest that States could choose as a matter of State law to permit hearing officers to award attorneys' fees to parents who are prevailing parties under Part B of the Act, and not to require that they do so, or imply that IDEA would be the source of the authority for granting hearing officers that role. If a State allows hearing officer's to award attorney's fees, requirements regarding training on attorneys fees would be a State matter.

Changes: Paragraph (b) has been revised to prohibit use of funds provided under Part B for related costs. The regulation has been amended to include all of the provisions of section 615(i)(3)(C)–(G) of the Act. The note following this section has been removed.

Child's Status During Proceedings (§ 300.514)

Comment: Although a few commenters agreed with the provision in § 300.514(c), many commenters objected to it. Section 300.514(c) states that if the decision in a due process hearing or administrative appeal agrees with the parents that a change of placement is appropriate, the decision must be treated as an agreement between the State or local agency and the parents for purposes of maintaining the child's placement pursuant to § 300.514(a). Commenters saw this provision as one-sided and suggested that it be limited to where there is agreement by all the parties. In the alternative, commenters suggested that the provision be deleted and that decisions as to whether a hearing officer's or review official's decision constitutes an agreement be left to the courts.

Commenters requested a definition of the term "current placement," with some suggesting that the definition include the current location where the child receives services.

Some of the comments indicated confusion as to which proceedings are referenced in § 300.514. Commenters were unsure whether the regulation references only the administrative and judicial due process proceedings established by section 615 of the Act, or also the State complaint procedures established by §§ 300.660–300.662.

Commenters requested that when referring to parents in this regulation, students who have reached the age of majority also be referenced. Further clarification also was requested regarding a parent's right to remove his or her child from the current placement and place them elsewhere during the pendency of the applicable proceedings if the parent believes FAPE is not being provided.

Discussion: The provisions maintaining the child's current educational placement pending proceedings regarding a complaint is a right afforded to parents to protect children with disabilities from being subjected to a new program that parents believe to be inappropriate. The provisions are intended to apply only to the due process proceedings and the subsequent civil action, if any, brought under section 615 of the Act, and not to the State complaint procedures in §§ 300.660–300.662, which are authorized by the General Education Provisions Act. This position is consistent with the Department's prior interpretation.

It is important to note that these provisions would only apply where there is a dispute between the parent and the public agency that is the subject of administrative or judicial proceedings. If there is no such dispute that is the subject of a proceeding, then the placement may be changed and this section does not apply.

This section does not permit a child's placement to be changed by the public agency during proceedings regarding a complaint, unless the parents and agency agree otherwise. While the placement may not be changed unilaterally by the public agency, this does not preclude the parent from changing the placement at their own expense and risk. It is also important to note that this provision does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others, including, as appropriate to the circumstances, seeking injunctive relief from a court of competent jurisdiction. In addition, even where there is disagreement between the parents and the public agency, the provisions of § 300.521 still allow a hearing officer to change the placement of a child with a disability who is substantially likely to injure self or others to an appropriate interim alternative educational setting for not more than 45 days.

Paragraph (c) is based on long-standing judicial interpretation of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. See, *e.g., Burlington School Committee* v. *Dept. Of Educ.*, 471 U.S. 359, 371 (1985); *Susquentia School District* v. *Raelee S.*, 96 F.3d 78, 84 (3rd Cir. 1996); *Clovis Unified* v. *Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under § 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency while an appeal is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate.

The term "current placement" is not readily defined. While it includes the IEP and the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom, the term is generally not considered to be location-specific. In addition, it is not intended that a child with disabilities remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.

There is no need to add a reference to children with disabilities who reach the age of majority in this regulation. The transfer of parental rights at the age of majority is discussed in another section of the regulations, § 300.517, and will not be referenced in every other section to which it applies.

There is also no need to address the parents' ability to change the child's placement unilaterally at their own expense since this issue is addressed in § 300.403.

Consistent with the general decision to remove all notes from these regulations, the note would be removed.

Changes: The note has been removed.

Surrogate Parents (§ 300.515)

Comment: Several commenters suggested that the regulation include clear procedures for terminating surrogate parents who do not appropriately fulfill their responsibilities and include in those procedures the consideration of the student's opinion. Relatedly, some commenters recommended that the regulation state that LEAs cannot impose sanctions or threaten sanctions if surrogate parents make decisions the LEA opposes.

There were also comments regarding the selection of surrogate parents. Some commenters asked that surrogates not be employees of private agencies who are involved in the education or care of the child since there is a potential conflict of interest where the public agency contracts with and pays the private agencies to provide services for the child. Another suggestion was that child welfare workers not be surrogate parents, but that foster parents be allowed, if qualified. One commenter agreed that representatives of the welfare system should not be surrogate parents but believed foster care representatives should also be barred. One commenter asked that the regulation require public agencies to assign surrogate parents designated by a parent, provided such persons meet the qualifications, thereby giving parents the right to voluntarily designate a surrogate parent and rescind such designation at any time.

Some comments also stated that § 300.19(b)(2) conflicts with § 300.515 because in § 300.515 the appointment of a surrogate parent is mandatory if the child is a ward of the State, regardless of whether the child has a foster parent who meets the "parent" criteria in § 300.19(b)(2). The comments recommended including an exception from the mandate of surrogate parent appointments for any ward of the State whose foster parent is a parent in accordance with § 300.19(b)(2).

Discussion: There is insufficient evidence of a wide-spread problem of irresponsible surrogate parents which would require regulatory procedures for termination. Therefore, the issue of the need for procedures for termination of surrogates is left to the discretion of States. There is also insufficient evidence of public agency retaliation against surrogate parents. Since there are other civil rights statutes and regulations that prohibit discrimination, including retaliation, against individuals who exercise their rights under Federal law, including the right of individuals to assist individuals with disabilities without retaliation or coercion, there is no need to address this issue in this regulation.

Proposed paragraph (c)(2)(i) of this section reflected the statutory requirement at section 615(b)(2) that a surrogate parent not be an employee of the SEA, LEA or any other agency that is involved in the education or care of the child. It is very important that the surrogate parent adequately represents the educational interest of the child, and not the interests of a particular agency. In the case of other governmental agencies, even agencies that are not involved in the education of the child, there is the possibility of a conflict between the interest of the child and those of the employee of the agency because some educational decisions will have an impact on whether an educational agency or some other governmental agency will be responsible for paying for services for the child. In situations where a child is in the care of a nonpublic agency that has no role in the education of the child, however, an employee of that agency may be the person best suited to serve as a surrogate for the child because of his or her knowledge of the child and concern for the child's well-being and would not, simply by virtue of his or her employment situation, have an interest that could conflict with the interest of the child. In such a case, that individual should not be prohibited from serving as a surrogate as long as he or she had no other interest that conflicts with the interest of the child and has knowledge and skills that will ensure adequate representation of the child.

Paragraph (a) of this section requires that the public agency ensure that the rights of the child are protected if the child is a ward of the State. Paragraph (b) sets out that the duty includes a determination of whether the child needs a surrogate parent and if so, the assignment of one. The proposed regulation at § 300.19(b)(2) has been renumbered at § 300.20 and now clarifies that the definition of a parent may include a foster parent unless State law prohibits it, and if certain other conditions are met. In situations where a child who is a ward of the State has a foster parent who meets the definition of parent in § 300.20 and the foster parent is acting as the parent, the public agency should determine if there is a need for a surrogate parent, and whether further steps are necessary to ensure that the rights of the child are protected. In most cases where the foster parent meets the definition of a parent and is acting as the parent, there would be no need to appoint a surrogate, unless the agency determined that in the particular circumstances of the case a surrogate was necessary to ensure that the rights of the child were protected.

Changes: Paragraph (c) has been amended to permit a public agency to appoint as a surrogate an employee of a nonpublic agency that provides only non-educational care to the child. Paragraph (d)(1) has been deleted. Paragraph (d)(2) has been redesignated as paragraph (d) and the reference to paragraph (d)(1) is deleted.

Transfer of Parental Rights at Age of Majority (§ 300.517)

Comment: There were several comments on the transfer of rights for incarcerated youths which requested clarification whether the transfer occurs regardless of age.

Commenters also requested clarification of what the transfer of rights to the child means for the parent, i.e., does the parent retain the right to any of the due process protections.

Commenters suggested that § 300.517 should refer to § 300.347(c) which deals with when and how students are to be notified of their impending transfer of rights. There was also a request for clarification regarding parental involvement in modifications to IEPs or placements when there is a bona fide security or compelling penological interest.

Commenters also requested guidelines for determining if a student cannot provide informed consent with respect to his or her educational program. Some interpreted the proposed regulation as requiring a competency determination prior to every transfer, deemed this unreasonable, and proposed that notice to parents is sufficient. Some recommended that the IEP team make the decision of whether a competency assessment is required and appoint a surrogate when the team decides the child is not able to provide informed consent for his or her educational program. Several commenters asked why the term "another appropriate individual" was used instead of "guardian or surrogate parent" as defined in § 300.515.

Some commenters asked that the Department allow a State which doesn't have a law regarding transfer of rights at age of majority to implement an interim policy pending legislative change.

Commenters also recommended that an independent advocate, not a teacher or LEA administrator but who is paid by the LEA, be available for each student to whom rights have transferred, to be present at all IEP discussions when parents are not present so that coercion by the school is prevented.

Discussion: It is not necessary to delineate the specific parental rights that transfer under this section because the statute and regulations fully set out the rights afforded to parents under Part B. The statute and paragraph (a)(1) of this section allow States, under State law, to transfer all parental rights to children with disabilities who reach the age of majority, with the exception of the right to notice which is both retained by the parents and transfers to the student. For children with disabilities who are incarcerated in adult or juvenile Federal, State or local correctional institutions, the State, under State law, may transfer all parental rights, including the notice rights, at the age of majority.

The IEP provisions regarding notice prior to the age of majority, do not have to be explained or referenced in this section of the regulations. While the requirement in § 300.347(c) that beginning at least one year before the student reaches the age of majority under State law the IEP must include a statement that the student has been informed of the rights that will transfer to him or her upon reaching the age of majority, does relate to this regulation, it is separate and distinct from the notice provisions in § 300.517(a)(3) requiring notice to the parent and child at the time of transfer—when the child actually reaches the age of majority.

This regulation does not need to address specifically the right to parental participation in IEP meetings for youth with disabilities convicted as adult and incarcerated in adults prisons whose parental rights have not transferred at the age of majority. These individuals would have the same rights as other youth with disabilities whose parental rights have not transferred as set out in section § 300.345. There is also no further need to address IEP and placement requirements that do not apply to modifications of IEP or placement for youth with disabilities convicted as an adult and incarcerated in an adult prison because the provisions are already set out at § 300.311(c)(2).

The requirement in paragraph (a) of this section regarding State provision for transfers of parental rights at the age of majority under State law generally does not require a statutory change if the State already has a State law regarding age of majority that applies to all children (except in cases of incompetency). A State may not transfer rights at age of majority in the absence of a State law on age of majority that applies to all children, except those children determined incompetent under State law.

With regard to the transfer of rights in situations where the competency of an individual with a disability is challenged, currently, most States have laws, rules, and procedures that allow a general determination of incompetency for an individual with a disability who has reached the age of majority. These laws and procedures usually require a formal proceeding and provide for the appointment of a general guardianship where the individual is found not to be competent under the applicable legal standard. The transfer of the Part B parental rights under State law must be consistent with State competency laws, that is, where parental rights transfer to the individual at the age of majority, and the individual is found to be incompetent, the appointed guardian would exercise Part B rights pursuant to their guardianship. In some States, there may be additional laws and procedures that allow for a lesser determination of competency for specific purposes, such as competency for providing informed consent with respect to the individual's educational program.

The special rule at § 300.517(b) only applies to States who, under State law, allow for this lesser determination of competency—a determination of the ability to provide informed consent with respect to the educational program of the student. Under the provision in the special rule that specifies appointing "the parent, or, if the parent is not available, another appropriate individual," a guardian or surrogate parent could be an appropriate individual to represent the educational interests of the student.

Changes: Paragraph (b) has been revised to make clear that it only applies if a State has a State mechanism lesser competency proceedings.

Discipline in general

(For a general overview of major changes in the discipline provisions from the NPRM to these final regulations, please refer to the preamble.)

Comment: Several commenters asked that the regulations include only the statutory language with respect to all provisions concerning discipline. The vast majority of commenters, however, asked that the regulations provide more specificity than the statute regarding discipline. In many cases, these commenters provided proposals for how the regulations should interpret the statute. Others asked that the regulations give schools the ability to deal differently with children with articulation problems and those with behavior disorders.

Discussion: Including only the statutory language on discipline in the final regulations, would not be helpful. The vast majority of the comments received concerning discipline demonstrate overwhelmingly the need to regulate in order to clarify the statutory language. To rely solely on the statutory language would encourage needless litigation. There is no statutory basis for treating children with disabilities differently under the discipline provisions because of the nature of their disability.

Change: None.

Authority of school personnel (§ 300.520)

Comment: A number of commenters were concerned about the provisions in the proposed regulations that required development of behavioral assessment plans and determinations regarding manifestation after the child had been removed for more than 10 school days in a school year because they believed that these responses should only be required if the removal constituted a "change of placement." These commenters asked that the term "change of placement" be defined in the regulation as indicated in Note 1 to the proposed regulations, in order to incorporate what they saw as the law's intent to allow building-level administrators some discretion to temporarily remove a child from their current educational placement if necessary to prevent disruption or ensure the safety of other children. Many of these commenters asked that the regulations clarify the distinction between removal of a student for disciplinary reasons and removal of a student for behavior management purposes.

Some commenters supported Note 1 as it clarified that schools continued to have the ability to remove children with disabilities from their current placement for limited periods of time when necessary, even though the child had previously been removed earlier that school year. Some commenters asked who is contemplated to be making the determination regarding a change in placement.

Some commenters proposed modifications to the change of placement standard described in Note 1 to this section to recognize that there could be circumstances when continued short term suspensions may be used without reconvening the IEP team if the IEP team has addressed the behavior through changes to the IEP or placement and agrees that removal from the child's current educational placement is an appropriate intervention.

Other commenters believed that the regulations should provide even more latitude to schools about when to convene an IEP meeting to review or develop a behavior assessment plan and conduct a manifestation determination, when for example, the behavior occurred repeatedly, or involved minor offenses. Some of these commenters thought that the IEP team should have the discretion to determine the need for a behavioral assessment or behavioral intervention plan on an individual basis.

Some commenters believed that paragraph (c) of the proposed regulations (and similar provisions in §§ 300.121 and 300.523(b)) exceed statutory authority by permitting school authorities to remove a child with disabilities from the child's current educational placement for up to 10 school days in a school year before the behavior assessment plan, services, or manifestation determination must be done. Many of these commenters indicated that any suspension is an indication that the child with a disability is having problems and the school should be required to initiate the behavioral assessment plan at the earliest indication of difficulty. For the same reasons, these commenters asked that the regulations not include references to suspensions without the provision of educational services.

Some commenters basically agreed with the position taken in paragraph (c) and §§ 300.121 and 300.523(b) but believed that the content of Note 2 should be strengthened by adding support for review of the IEP for any short suspension that in the judgment of the parent or other member of the IEP team, requires reconsideration of behavioral interventions or other IEP revisions. Some commenters noted that paragraph (c) needed further clarification, as school personnel cannot reasonably be expected to predict future conduct of a child.

Discussion: The obligation to conduct a functional behavioral assessment or to review an existing behavioral intervention plan is not linked in the statute only to situations that constitute a "change of placement." As a policy matter, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. In fact, IDEA now emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP team consider, as appropriate, and address in the child's IEP, "strategies, including positive behavioral interventions, strategies, and supports to address the behavior." (section 614(d)(3)(B)(i)).

On the other hand, there is merit to the argument that schools should not have to repeatedly convene IEP team meetings to address the behavior of children who already have behavior intervention plans, unless there is a need. The position that services and the development of a behavioral assessment plan are not triggered if a child with disabilities is removed from his or her current placement for 10 school days or less in a given school year is based on the language of the statute at section 612(a)(1)(A) and section 615(k)(1)(B), as interpreted in light of the legislative history of the Act, which notes that the statute was designed to "reinforce and clarify the understanding of Federal policy on this matter, which is currently found in the statute, case law, regulations, and informal policy guidance." (S. Rep. No. 105-17, p. 28; H.R. Rep. No. 105-95, p. 108 (1997)).

In light of the Department's longstanding position that children with disabilities could be removed from their current educational placement for not more than 10 consecutive school days without educational services, the 10 day in a school year window before the educational services and behavioral assessment plan are triggered is a reasonable interpretation of the statute. This interpretation gives school officials reasonable flexibility for dealing with minor infractions of school rules by children with disabilities, yet ensures that children with disabilities are not cut off from educational services and that their behavior is appropriately addressed.

In order to clarify the ability of school personnel to temporarily remove a child from the current educational placement when necessary to ensure the safety of other children or to prevent disruption of the learning environment, the concept of "change of placement" that was referred to in Note 1 to this section in the NPRM should be incorporated into the regulations. The Department has long interpreted the IDEA to permit schools to remove a child with a disability from his or her current placement when necessary, even though the child had previously been removed earlier that school year, as long as the removal does not constitute a "change of placement."

The "change of placement" description will also make clear that the new statutory language at section 612(k)(1)(A) of the Act regarding the authority of school personnel to remove children with disabilities for not more than 10 school days, to the same extent as nondisabled children, does not permit using repeated disciplinary removals of 10 school days or less as a means of avoiding the normal change of placement protections under Part B. Whether a pattern of removals constitutes a "change of placement" would be determined on a case by case basis by the public agency and subject to review through due process and judicial proceedings. The regulation concerning change of placement would only apply to removals for disciplinary reasons.

If a child who is being removed from his or her current educational placement has already been the subject of a special IEP team meeting to develop a behavioral intervention plan or review its implementation, the IEP team should not have to meet to review that plan as long as the team members individually review the plan, unless one or more of the team members believe that the plan needs to be modified. In this way, the IEP team will be monitoring the implementation of the behavioral intervention strategies in the IEP or behavioral intervention plan but would not have to repeatedly reconvene each time removals from the child's current placement are carried out.

In light of the comments received and the reasons previously discussed, proposed Note 2 would be deleted.

Comments concerning the timing of manifestation determinations, and changes made in response to those comments are addressed in this attachment under § 300.523.

Change: A new section § 300.519 has been added regarding change of placement in the context of removals under §§ 300.520–300.529, reflecting concepts from proposed note 1. Section 300.520(a)(1) has been revised to clarify that more than one suspension each of which may be for up to 10 school days would be permitted in a school year, as long as repeated suspensions do not constitute a change of placement, and the removals are consistent with treatment of similarly situated children without disabilities. Paragraph (a)(1) of this section also has been revised to clarify the need to provide services when a child with a disability has been removed for more than 10 school days in a school year. Section 300.520(b) has been revised to require, when a child is first removed for more than 10 school days in a school year and for subsequent removals that constitute a change in placement, an IEP team meeting to develop a functional behavioral assessment plan and a subsequent behavioral intervention plan or to review an existing behavioral intervention plan and its implementation. Section 300.520(c) has been revised to specify that if the child is subsequently removed and that removal is not a change in placement, the IEP team does not have to meet to review the behavioral intervention plan unless one or more team members believes that modifications are needed to the plan or the plan's implementation. Proposed Notes 1 and 2 have been deleted.

Comment: A number of commenters had suggestions for clarifications of the terms used in paragraph (a). Some wanted the regulations to specify whether days of suspension includes days of in-school suspension, bus suspensions, or portions of a school day. Others asked whether an in-school suspension would be considered a part of the days of suspension if the student continued to receive the academic instruction called for in the student's IEP during that period. Others suggested that the term "suspension" be revised to specify that school personnel can order a short term suspension of 10 or fewer consecutive school days or cumulative days which may exceed 10 school days in a school year but do not constitute a change in placement.

Discussion: An in-school suspension would not be considered a part of the days of suspension addressed in paragraph (a) of this section as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement. Portions of a school day that a child had been suspended would be included in determining whether the child had been removed for more than 10 cumulative school days or subjected to a change of placement under § 300.519.

Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension under § 300.520 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension would not be a suspension under § 300.520. In those cases, the child and his or her parents would have the same obligations to get to and from school as a nondisabled child who had been suspended from the bus. However, public agencies should attend to whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether bus behavior should be addressed in the IEP or behavioral intervention plan for the child.

It is important that both school personnel and parents understand that school personnel may remove a child with a disability from his or her current placement for not more than 10 school days at a single time, but that there is no specific limit on the number of days in a school year that a child may be removed. (See, discussion of § 300.121 regarding when services must be provided.) However, school authorities may not remove a child with disabilities from the child's current educational placement if that removal constitutes a change of placement under § 300.519, unless they are specifically authorized to do so under § 300.520(a)(2) (school personnel unilateral removal for weapons and drug offenses) or unless the parents of the child do not object to a longer removal or the behavior is determined to not be a manifestation of the child's disability. If a removal does constitute a change of placement under § 300.519 that is not permitted under § 300.520(a)(2), school personnel must follow appropriate change of placement procedures, including prior parent notice, and the right of the parent to invoke the "stay-put" rule of § 300.513.

Change: Paragraph (a)(1) of this section is revised to specify that school personnel may order removals of a child with a disability from the child's current placement for not more than 10 consecutive school days so long as the removal does not constitute a change in placement under § 300.519.

Comment: A number of commenters were concerned that the term "carries" in paragraph (a)(2)(i) is too narrow and wanted the regulation to also cover the child who was in possession of a weapon at school, including instances when the child obtained the weapon at school. Others thought that paragraph (a)(2)(i) should apply to situations when a child knowingly carries a weapon to school, similar to the standard in paragraph (a)(2)(ii) regarding knowing possession or use of illegal drugs.

Discussion: The statutory language "carries a weapon to school or to a school function" is ambiguous as to whether it includes instances in which a child acquires a weapon while at school. In light of the clear intent of Congress in the Act to expand the authority of school personnel to immediately address weapons offenses at school, the Department's opinion is that this language also covers instances in which the child is found to have a weapon at school that he or she obtained while at school.

Change: None.

Comment: A number of commenters asked for more clarification about the various provisions regarding removals from a child's current placement, suspensions of 10 days or less, 45-day placements, and, for children whose behavior is determined not a manifestation of their disability, other disciplinary measures, including the possibility of expulsion, related to one another. For example, some commenters asked for specificity about whether a child could be subject to a disciplinary suspension, including the 45-day interim alternative educational setting placements more than once in a school year.

Some commenters asked whether the behavior assessment plan and manifestation determination need to be done within the first 10 days of a 45-day placement. Some asked whether schools can keep children with disabilities in the 45-day placement even if the behavior is determined to be a manifestation of the child's disability, or even if program adjustments in the child's "current placement" are agreed on before the expiration of the 45-day placement.

Commenters also asked how the 45-day placement rules should be applied when the behavior leading to the removal occurs in the last few days of the school year. A few asked how 45-

day placements differ from any other removal for more than 10 days or whether 45-day placements should merely be considered exceptions to the "stay put" provision. Others also inquired about the total number of days that a child with disabilities could be suspended in a year.

Others asked for clarity about whether school districts could suspend beyond the 10 day and 45 day periods mentioned in this section and whether children with disabilities could ever be expelled. Some commenters asked that the regulations emphasize the optional nature of the ability to use the 45-day placement and encourage the return of children with disabilities to their regular educational placement at the earliest appropriate time.

Discussion: If parents and school personnel agree about a proposed change of placement for disciplinary reasons, the rules concerning the amount of time that a child with a disability may be removed from his or her educational placement in §§ 300.520 and 300.521 do not have to be used. However, services must be provided consistent with the requirements of § 300.121(a).

These regulations do not prohibit a child with a disability from being subjected to a disciplinary suspension, including more than one placement in a 45-day interim alternative educational setting in any given school year, if that is necessary in an individual case (*e.g.*, a child might be placed in an alternative setting for up to 45 days for bringing a weapon to school in the fall and for up to 45 days for using illegal drugs at school in the spring).

If a child engages in one of the behaviors identified in § 300.520(a)(2) (carrying a weapon to school or a school function or knowing possession or use of illegal drugs or selling or soliciting the sale of a controlled substance at school or a school function), the school may first remove the child for up to 10 consecutive school days (providing services as necessary under § 300.121(d)) while convening the IEP team to determine the interim alternative educational setting under § 300.522. At the end of that 10 day period, or earlier, if feasible, the child would be placed into the interim alternative educational setting for up to 45 days.

The placements contemplated under §§ 300.520(a)(2) and 300.521 (removal by hearing officer based on determination of substantial likelihood of injury in current placement) are specific exceptions to the obligation to maintain the child in the child's current placement if the parent disagrees with a proposed change of placement and therefore, may continue even if the child's behavior is determined to be a manifestation of the child's disability. The purpose of §§ 300.520(a)(2) and 300.521 placements is to enable school personnel to ensure learning environments that are safe and conducive to learning for all and to give those officials and parents the opportunity to determine what is the appropriate placement for the child.

Interim alternative educational settings under § 300.520(a)(2) are limited to 45 calendar days, unless extended under § 300.526(c) for a child who would be dangerous to return to the child's placement before the removal. The fact that school is in recess during a portion of the 45 days does not "stop the clock" on the 45 days during the school recess.

There is no specific limit on the total number of days during a school year that a child with disabilities can be suspended. In addition, as explained in more detail in the discussion under § 300.524, if a child's behavior is determined not to be a manifestation of the child's disability, the child may be disciplined in the same manner as nondisabled children, including suspension and expulsion, except that FAPE, consistent with § 300.121(d), must be provided.

The 45-day interim alternative educational settings are not mandatory. If the parents agree with school officials to a change in the child's placement there is no need to use a 45-day interim alternative educational setting. In some instances school officials or hearing officers may determine that a shorter period of removal is appropriate and that a child can be returned to his or her current educational placement at an earlier time.

Change: None.

Comment: A number of commenters asked for guidance regarding the terms in paragraph (b) regarding functional behavioral assessment, and behavioral intervention plan. Some asked that functional behavioral assessment should not be construed to be overly prescriptive. These commenters believed that behavioral assessments should be flexible so that the team can consider the various situational, environmental and behavioral circumstances involved.

Some commenters proposed that a functional behavioral assessment be defined as a process which searches for an explanation of the purpose behind a problem behavior, and that behavior intervention plan be defined as IEP provisions which develop, change, or maintain selected behaviors through the systematic application of behavior change techniques. Some commenters suggested that positive behavioral interventions and strategies should include strategies and services designed to assist the child in reaching behavioral goals which will enhance the child's learning and, as appropriate, the learning of others. Some asked whether a functional behavior assessment is an evaluation requiring parent consent before it is done. Others asked whether a behavioral assessment could be a review of existing data that can be completed at that IEP meeting. Some asked whether a behavioral intervention plan needed to be a component of a child's IEP, and the relationship of this to the positive behavioral interventions mentioned in the IEP sections of the regulations.

Discussion: In the interests of regulating only when necessary, no change is made regarding what constitutes a functional behavioral assessment, or a behavioral intervention plan. IEP teams need to be able to address the various situational, environmental and behavioral circumstances raised in individual cases. A functional behavioral assessment may be an evaluation requiring parent consent if it meets the standard identified in § 300.505(a)(3). In other cases, it may be a review of existing data that can be completed at the IEP meeting called to develop the assessment plan under paragraph (b)(1) of this section. If under § 300.346 (a) and (c), IEP teams are proactively addressing a child's behavior that impedes the child's learning or that of others in the development of IEPs, those strategies, including positive behavioral interventions, strategies and supports in the child's IEP will constitute the behavioral intervention plan that the IEP team reviews under paragraph (b)(2) of this section.

Change: None.

Comment: Some commenters stated that paragraph (b)(1) should not require the development of appropriate behavioral interventions within 10 days of removing a child from the current placement as it is operationally unworkable. Some commenters asked that the regulations also require that the IEP team determine whether an existing behavior plan has been fully implemented, and if not, take steps to ensure its implementation without delay. Other commenters stated that the term suspension" in paragraph (b)(1) should be replaced with "removal."

Discussion: Paragraph (b)(1) in the NPRM was not intended to require the development of appropriate behavioral interventions within 10 days of removing a child from the current placement. Instead, it was intended to require that the LEA implement the assessment plan and ensure that the IEP team, after that assessment, develops appropriate behavioral interventions to address the child's behavior and implements those interventions as quickly as possible. Because it is unlikely that these steps could occur at the same time, a change should be made to the regulations to clarify that the LEA convene an IEP meeting, within 10 business days of removing the child, to develop an assessment plan, and, as soon as practicable on completion of that plan, to develop appropriate behavioral interventions to address that behavior. This section also would be revised to clarify when the IEP team would have to meet in instances in which there is an existing behavioral intervention plan. The commenters are correct that the term "removal" should be used in paragraph (b)(1) rather than "suspension" because it applies to all disciplinary actions under § 300.520(a).

Change: Paragraph (b) has been amended by replacing "suspension" with "removal" and to specify that the LEA convene an IEP meeting to develop an assessment plan, and as soon as practicable on completion of that plan, to develop appropriate behavioral interventions to address that behavior.

Comment: Some commenters asked that the regulations permit school personnel, under § 300.520(a)(2), and hearing officers, under § 300.521, to remove for up to 45 school days as opposed to calendar days. Other commenters asked that the regulations use the term "calendar days" for all timelines in this section.

Some commenters asked that the regulations permit school personnel to remove to a 45-day interim alternative educational setting for an assault. Other commenters asked that the 45-day limitation not apply to behavior that is determined to be not a manifestation of the child's disability.

Discussion: As explained in detail in the discussion concerning the regulatory definition of "day," the statute uses the term "school day" when that is intended. It also would be inappropriate to use "calendar days" for all timelines in this section as the statute uses the term "10 school days" when that is intended.

The statute does not authorize school personnel to remove children with disabilities to an interim alternative educational setting for 45 days in cases of an assault. However, under § 300.521, a public agency may ask a hearing officer to order a child removed to an interim alternative educational setting for not more than 45 days if maintaining the child in the current placement is substantially likely to result in injury to the child or to others.

In addition, if necessary, school officials can seek appropriate injunctive relief to move a child. The placements under §§ 300.520(a)(2) and 300.521 apply whether the behavior is or is not a manifestation of the child's disability under § 300.523. If the behavior is determined not to be a manifestation of the child's disability, the child may be subjected to the same disciplinary action as a nondisabled child (which could be a removal for more than 45 days) except that services must be provided consistent with § 300.121(d).

Change: None.

Comment: Some commenters asked that paragraph (d) of the regulations provide the complete definition of "dangerous weapon" and "controlled substance."

Discussion: It is not advisable to provide the complete statutory definitions of "dangerous weapon" and "controlled substance" in the text of the regulations as the statute ties these definitions to the content of other Federal law. If, for example, the Controlled Substances Act were to be amended to change the definition of "controlled substance" in section 202(c) of that Act, the Part B regulatory definition also would need conforming amendments. In addition, the definition of "controlled substance" in section 202(c) of the Controlled Substances Act is extensive and extremely detailed. The Department will make this information widely available through a variety of other means.

Change: None.

Authority of Hearing Officer (§ 300.521)

Comment: Several commenters stated that the hearing officer under this section, in order to deal with dangerous situations, must be able to immediately remove a child without the requirement of convening a hearing. A number of these commenters believed that the hearing officer under this section should be able to make a determination based on a review of available information presented by the LEA, much like an LEA requesting a temporary restraining order from a court. Other commenters asked that the regulations specify that the hearing officer must be impartial and qualified to assess the child's disability and the circumstances surrounding the removal.

Several commenters asked that the regulations explain that a school district has the right to seek injunctive relief, such as a temporary restraining order, when a student is a danger to self or others.

Discussion: The statute provides that the hearing officer must be able to determine that a public agency has demonstrated by substantial evidence, which is defined as beyond a preponderance of the evidence, that maintaining the child in the current placement is substantially likely to result in injury to the child or others. This evidentiary standard requires that the hearing officer weigh the evidence received from both parties, rather than just information presented by the public agency. Public agencies continue to have the right to seek injunctive relief from a court when they believe they have the need to do so. Hearing officers in expedited due process hearings must meet the same standards of impartiality and knowledgeability as other hearing officers under the Act.

Change: None.

Comment: Several commenters asked that paragraph (a) of this section be revised to specify that the injury to the child or others must be more than a minor injury. Others asked that the regulations not require that the child would be an imminent threat to the safety or health of other members of the school community before the child could be removed.

Several commenters requested that paragraph (c) be revised to require the hearing officer to determine, rather than consider, whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement. Other commenters asked that the regulations specify that if the hearing officer finds that the current placement is inappropriate, the hearing officer shall order that the current placement be made appropriate rather than ordering an interim alternative educational setting. Further, if the hearing officer finds that the public agency has not made reasonable efforts to minimize the risk of harm in the child's current placement, they urged, the hearing officer must order the public agency to make the reasonable efforts to minimize the risk of harm rather than ordering placement in an interim alternative educational setting.

Discussion: No changes will be made to the regulations regarding the amount of injury that would be substantially likely to result if the child is not removed. In addition, no changes will be made regarding a hearing officer's decision making. In fashioning appropriate relief, hearing officers will exercise their judgement in the context of all the factors involved in an individual case.

Change: None.

Comment: A number of commenters requested clarification of the term "beyond a preponderance of the evidence." Others asked that the term be revised as the "the preponderance of the evidence" as that is the highest evidence standard in civil litigation.

Discussion: The phrase "beyond a preponderance of the evidence" is statutory.

Change: None.

Determination of Setting (§ 300.522)

Comment: A number of commenters asked that the regulations clarify the relationship between the authority of school personnel in § 300.520(a)(1) to order the removal of a child with a disability for not more than 10 school days, and the requirement in § 300.522 that the alternative educational setting be determined by the IEP team. These commenters noted that the school personnel need the authority to remove under § 300.520(a)(1) without input from the IEP team.

A number of commenters requested clarification on when the IEP team must make the determination of setting and where the child would be while that determination was being made, particularly for children with disabilities who already had been removed from their regular placement for 10 days during that school year. Some of these commenters noted that when a child is removed under §§ 300.520(a)(2) or 300.521 the alternative setting needs to be immediately available.

Some commenters question where the child would be while the hearing under § 300.521 is being held, noting that § 300.521(d) requires the hearing officer's determination include deciding whether the interim alternative educational setting meets the standards of § 300.522, and wondering when the IEP team would meet. Some commenters asked that the regulations make clear that a child with a disability can be removed from the child's current placement for up to 10 days before the IEP team would have to make the determination in § 300.522.

Some commenters stated that requiring the IEP team to determine the setting when a hearing officer removes a child exceeds the statute.

Other commenters thought that the provisions of § 300.522 are in conflict with the authority of school personnel to order removal under § 300.520.

Discussion: Under §§ 300.519 and 300.520(a)(1), school personnel have the authority to remove a child with disabilities for not more than 10 consecutive school days (to the same extent as for nondisabled children) except that the removal may not constitute a change of placement. School personnel need the ability to remove a child with a disability from the current educational placement under § 300.520(a)(1) and to provide educational services in some other setting without waiting for an IEP team to make a determination about that alternative educational setting in order to maintain a learning environment conducive to learning for all children.

At the same time there is a need to ensure that information about the child's special education needs and current IEP be brought to bear in decisionmaking about services to the child during short removals and for those short periods before the IEP team can meet to determine appropriate placement under § 300.520(a)(2) or a hearing officer determines the interim alternative educational setting under § 300.521. Therefore, a change should be made to § 300.522(a) to specify that the IEP team determines the interim alternative educational setting under § 300.520(a)(2).

A change to § 300.121(d) would specify that school personnel, in consultation with the child's special education teacher, determine the interim alternative educational setting for removals under § 300.520(a)(1)(removals by school personnel for 10 school days or less). A child whose behavior subjects him or her to an interim alternative educational setting under § 300.520(a)(2)(weapons or drugs) or § 300.521(substantial likelihood of injury), may first be removed by school personnel for not more than 10 consecutive school days, or until the removal otherwise constitutes a change of placement under § 300.519, and during that 10 day or less removal, services, as necessary under § 300.121(d), would be provided as determined by school personnel, in consultation with the child's special education teacher. This will ensure that the need of school personnel to be able to make these decisions swiftly is honored, while emphasizing the learning needs of the child in that removal period. While the child is in that 10 school day or less setting, the IEP team meetings and expedited due process hearings under §§ 300.522 and 300.521, respectively, can be conducted so that the IEP team or hearing officer, as the case may be, can determine the up to 45 day interim alternative educational setting.

When a hearing officer has determined that a child is substantially likely to injure self or others in his or her current placement and is ordering a 45 day interim alternative educational setting under § 300.521, the hearing officer is charged with determining whether the interim alternative educational setting meets the statutory requirements and not with selecting one that meets those requirements. Permitting the school personnel, in consultation with the child's special education teacher, to initially select and propose the interim alternative educational setting is less administratively cumbersome for school personnel than the scheme in the proposed regulation and helps ensure that there is no undue delay in placement. The review of the proposed placement by the hearing officer ensures that the setting will meet statutory standards, thus protecting the rights of the child. The hearing officer may revise or modify the proposed placement, or select some other placement as necessary to meet that statutory standard. Of course, in proposing an interim alternative educational setting, school personnel may rely on the judgments of the child's IEP team if they choose to do so. This position would be accomplished through the regulatory change to § 300.121(d) mentioned previously. The statute at section 615(k)(3)(A) is clear that when school personnel are removing a child for a weapons or drug offense, the IEP team determines the interim alternative educational setting.

Change: This section has been amended to specify that the alternative educational setting referred to in § 300.520(a)(2) is determined by the IEP team. Section § 300.521(d) has been revised to recognize that the hearing officer reviews the adequacy of the interim alternative educational setting proposed by school personnel who have consulted with the child's special education teacher.

Comment: A number of commenters suggested revisions to paragraph (b) to provide certain limitations on the services that must be provided in the interim alternative educational setting such as specifying that the setting must be one that is immediately available to students removed, the services on the child's current IEP will continue to the extent feasible, or the child will continue to participate in the general curriculum to the extent determined appropriate by the IEP team. Others urged that the regulations make clear that the interim alternative educational setting should not have to be a setting that can provide all the same level of courses or courses that are not a part of the core curriculum of the district (i.e., would not have to provide honors level courses, electives, advanced subject courses that are not part of the core curriculum of the district) or are extracurricular activities and sports. Others asked about classes such as chemistry, shop or physical education that have specialized equipment or facilities. Some commenters noted that it would not be reasonable and would be prohibitively expensive and procedurally burdensome to require that interim alternative education settings provide the same courses as offered in regular schools. They argued that requiring that interim alternative educational settings include the same courses as in regular schools would discourage schools from taking appropriate measures to deal with weapons, drugs and children who are dangerous to themselves or others. Some commenters stated that they did not believe that the services required for students whose behavior is not a manifestation of their disability should be as extensive as those required for students whose behavior is determined to be a manifestation of their disability.

Some commenters asked that the regulations specify that services in the interim alternative educational setting must be provided by qualified personnel in a placement that is appropriate for the student's age and level of development. Others asked that the IEP written for the interim alternative educational setting should address the services and modifications that will enable the child to meet the child's current IEP goals in the alternative setting.

Discussion: The statute describes the services that must be provided to a child who has been placed in an interim alternative educational setting, which must be applied to removals under §§ 300.520(a)(2) and 300.521, and these standards, with a minor modification discussed later in this section, are reflected in § 300.522(b). The proposed regulation, at § 300.121(c), had indicated that the same standards should be applied to other types of removals as well, that is, removals that did not constitute a change in placement and long-term suspensions or expulsions under § 300.524 for behavior that is determined not to be a manifestation of a child's disability. However, as suggested by the comments received, there are reasons why what would be required for these other types of removals may be different than for 45 day interim alternative educational settings. Therefore, the regulation at § 300.121(d) would provide that for removals under §§ 300.520(a)(1) and 300.524, the public agency provides services to the extent necessary to enable the child to adequately progress in the general curriculum and advance toward achieving the goals set out in the child's IEP, as determined by school personnel, in consultation with the child's special education teacher, if the removal is under § 300.520(a)(1) or by the child's IEP team, if the removal is under § 300.524.

Under these rules, the extent to which instructional services need to be provided and the type of instruction to be provided would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. For example, a child with a learning disability who is placed in a 45 day placement will likely need far more extensive services in order to progress in the general curriculum and advance appropriately toward meeting the goals of the child's IEP than would a child who is removed for only a few days, and is performing at grade level. Because the services that are necessary for children with disabilities who have been removed for disciplinary reasons will vary depending on the individual facts of a particular case, no further specificity regarding those services is appropriate.

What constitutes the general curriculum is determined by the SEA, LEA or school that the student attends, as appropriate under State law. In some cases, honors level classes or electives are a part of the general curriculum, and in others they may not be. With regard to classes such as chemistry or auto mechanics that generally are taught using a hands-on component or specialized equipment or facilities, and that are considered to be a part of the general curriculum, there are a variety of available instructional techniques and program modules that could be used that would enable a child to continue to progress in the general curriculum, although the child is not receiving instruction in the child's normal school or facility. However, in order to assist in clarifying that a school or district does not have to replicate every aspect of the services that a child would receive if in his or her normal classroom, a change would be made to refer to enabling the child to continue to "progress in" the general curriculum, rather than "participate in" the general curriculum.

Changes: Paragraph (b) has been revised to apply to removals under §§ 300.520(a)(2) and 300.521. Paragraph (b)(1) has been revised to refer to enabling the child to continue to "progress in" the general curriculum. Language has been added to § 300.121(d) to provide that for a child who has been removed under § 300.520(a)(1) or § 300.524, the public agency provides services to the extent necessary to enable the child to adequately progress in the general curriculum and advance toward achieving the goals set out on the child's IEP, as determined by school personnel in consultation with the child's special education teacher if the removal is under § 300.520(a)(1) or by the child's IEP team if the removal is under § 300.524.

Comment: Several commenters asked that the statutory language in paragraph (b)(2) requiring that the interim alternative educational setting address the child's behavior "so that it does not recur" be replaced with language requiring the LEA to develop a program that attempts to prevent the inappropriate behavior from recurring.

Other commenters asked that a note be added to emphasize that the interim alternative educational setting be designed to ensure FAPE and to evaluate the behavior, the IEP services provided, and the previous placement and to develop an IEP that will reduce the recurrence of the behavior. Some commenters asked that the reference to other behavior in this paragraph be rephrased to limit it to other current relevant behavior. Others asked that the reference to days in a given school year be removed.

Discussion: In order to provide additional clarity on this point, a change should be made to specify that those services and modifications are designed to prevent the inappropriate behavior from recurring. In light of the changes previously discussed that limit the application of this section to removals under §§ 300.520(a)(2) and 300.521, the reference to other behavior would be removed, as these are now addressed in § 300.121(d).

Change: Paragraph (b)(2) has been revised to clarify that it applies to removals under §§ 300.520(a)(2) and 300.521 and to specify that the services and modifications to address the behavior are designed to prevent the behavior from recurring.

Comment: A number of commenters requested that the regulations specify that home instruction could not be used as an interim alternative educational setting. Others asked that the regulations clarify that an interim alternative educational placement may be any placement option, including, but not limited to home instruction. Others asked for clarification of when home instruction would be an appropriate placement for a child who is subject to disciplinary action. Some commenters asked that the regulations specify that home instruction and independent study would not generally be an interim alternative educational setting. Others asked that home instruction be prohibited as an interim alternative educational setting unless the parents agree. Some commenters asked for guidance on what could be considered an appropriate interim alternative educational setting for rural or remote areas where there is only one school and no other appropriate public facility.

Discussion: Whether home instruction would be an appropriate alternative educational setting under § 300.522 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from their regular placement, and include consideration of the child's needs and educational goals. (The proposed note following § 300.551 regarding home instruction would be deleted.) In general, though, because removals under §§ 300.520(a)(2) and 300.521 will be for periods of time up to 45 days, care must be taken to ensure that if homebound instruction is provided for removals under § 300.522, the services that are provided will satisfy the requirements for a removal under § 300.522(b).

Change: None.

Comment: Some commenters asked that a provision be added to § 300.522 to specify that a hearing officer considering an interim alternative educational setting may modify the setting determined by the IEP team to meet the requirements of paragraph (b) of this section.

Discussion: Hearing officers have the ability to modify the interim alternative educational setting that has been proposed to them as necessary to meet the standards of enabling the child to continue to participate in the general curriculum, continue to receive those services and modifications that will enable the child to meet the goals on the child's current IEP and include services and modifications designed to address the behavior so that it does not recur. As previously explained, these final regulations do not require an IEP team to propose an interim alternative educational setting to a hearing officer under § 300.521, although school districts are encouraged to use the child's IEP team to make decisions about the interim alternative educational setting that is proposed to the hearing officer.

Change: None.

Manifestation Determination Review (§ 300.523)

Comment: A number of commenters expressed concern about paragraph (b) of this section. On the one hand, a number of the commenters asked that the reference to "in a given school year" be struck so that the provision would permit no manifestation determination review whenever the removal did not amount to a change of placement. On the other hand, other commenters thought there was no basis in the statute for any exception, and that a manifestation review would need to be conducted whenever discipline was contemplated for a child with a disability. Some commenters asked that the exception be expanded to include situations when the child's IEP includes the use of short term suspensions as an appropriate intervention, or where the IEP team has otherwise addressed in the IEP the behavior that led to the removal. Some commenters stated that paragraph (a)(1) should refer to procedural safeguards under § 300.504 rather than procedural safeguards under this section. Other commenters noted that advance notification of disciplinary action is unrealistic and that the regulations should note that fact. Others asked that the regulations specify that prior written notice was not required.

Discussion: A manifestation determination is important when a child has been removed and that removal constitutes a change of placement under § 300.519. If a removal is a change of placement under § 300.519, a manifestation determination will provide the IEP team useful information in developing a behavioral assessment plan or in reviewing an existing behavioral intervention plan under § 300.520(b). It will also inform determinations of whether or not a public agency may implement a disciplinary action that constitutes a change of placement for a child, other than those provided for in §§ 300.520(a)(2) and 300.521. Requiring a manifestation determination for removals for less than 10 consecutive school days that are not a change of placement under § 300.519, would be of limited utility and would impose unnecessary burdens on public agencies as the determination often would be made after the period of removal was over. Furthermore, limiting manifestation determination to removals that constitute a change of placement under § 300.519 is consistent with the statutory language of section 615(k)(4)(A).

However, if a child is being suspended for subsequent short periods of time, parents can request an IEP meeting to consider whether the child is receiving appropriate services, especially if they believe that there is a relationship between the child's disability and the behavior resulting in those suspensions. Public agencies are strongly encouraged to grant any reasonable requests for IEP meetings. Functional behavioral assessments and behavioral intervention plans are to be completed in a timely manner whether required under § 300.520(b) or otherwise determined appropriate by the child's IEP team (see § 300.346(a)(2)(i)). In addition, if a child is subsequently suspended for short periods of time, a parent or other individual could question whether a change of placement, which would require a manifestation determination, has occurred because of an alleged pattern of removals.

For clarity, a change should be made to refer to the procedural safeguards notice under § 300.504. Paragraph (a)(1) of this section does not require prior written notice. It does require notice to parents no later than the date on which the decision to take the action is made. To that extent, it constitutes a limited exception to the requirement to provide prior written notice in § 300.503. Other removals that do not constitute a change of placement do not require prior written notice.

Change: Paragraph (a) of this section has been revised to specify that the manifestation determination review is done regarding behavior described in §§ 300.520(a)(2) and 300.521 or any removal that constitutes a change of placement under § 300.519. Paragraph (a)(1) of this section has been amended to require that parents be provided notice of procedural safeguards consistent with § 300.504. Paragraph (b) has been removed.

Comment: A number of commenters requested clarification of the term "other qualified personnel" as used in proposed paragraph (c) of this section. Some of these commenters asked that the regulations include language like that in the note following § 300.344 that in the case of a child whose behavior impedes the learning of the child and others, the IEP team should include someone knowledgeable about positive behavioral strategies and supports. Others asked that the term not be interpreted as including only school personnel but should include persons familiar with the child and the child's disabilities, such as the child's treating physician. Others wanted the regulations to specify that the team include persons who are fully trained and qualified to understand the child's disability. Many asked that term also be added to references to the IEP team in proposed paragraphs (d), (e) and (f) of this section. Some commenters asked that proposed paragraph (c) clarify that the manifestation determination needs to be made at an IEP meeting, as some districts are not holding IEP team meetings for this purpose.

Discussion: The language regarding the IEP team and other qualified personnel is taken directly from the statute. The term "other qualified personnel" may include individuals who are knowledgeable about how a child's disability can impact on behavior or on understanding the impact and consequences of behavior, and persons knowledgeable about the child and his or her disabilities. For the sake of clarity, references to the IEP team in paragraphs (c) and (d) of this section should be expanded to include "and other qualified personnel." In order to clarify that the manifestation determination review is done in a meeting, a change should be made to paragraph (b). This review involves complex decision making that will be significantly different from the very limited review that is done under § 300.520(b)(2) if no modifications are needed to a child's behavioral intervention plan.

Change: Redesignated paragraph (b) has been revised to specify that the manifestation determination review is conducted at a meeting. Redesignated paragraphs (c) and (d) have been amended by adding "and other qualified personnel" after "IEP team" each time it is used.

Comment: Several commenters were concerned that proposed paragraph (d)(2)(ii) and (iii) put schools at a significant disadvantage by having to prove the negative—that disability did not impair the ability of the child to understand the impact and consequences of the behavior and that disability did not impair the child's ability to control behavior. Other commenters asked that the review process also include consideration of any unidentified disability of the child and the antecedent to the behavior that is subject to discipline and permit record expungement if it is later determined that the child did not commit the act that is the subject of the manifestation determination.

Some commenters stated that proposed paragraph (e) created too rigid a standard and asked that it be modified to give districts more leeway if a mistake has been made.

Discussion: The language in paragraphs (c)(2)(ii) and (iii) is taken directly from the statute. Given that the review process includes consideration of all relevant information, including evaluation and diagnostic results, information supplied by the parents, observations of the child and the child's current IEP and placement, the review could include consideration of a previously unidentified disability of the child and of the antecedent to the behavior that is subject to discipline. If it is later determined that the child did not commit the act that is subject to discipline, the question of record expungement would be handled the same way such matters are addressed for nondisabled children.

The interpretation in paragraph (d) on how the manifestation determination is made, using the standards described in paragraph (c), is based on the explanation of the decision process in the congressional committee reports on Pub. L. 105-17. Those reports state that the determination described in § 300.523(d):

> . . . recognizes that where there is a relationship between a child's behavior and a failure to provide or implement an IEP or placement, the IEP team must conclude that the behavior was a manifestation of the child's disability. Similarly, where the IEP team determines that an appropriate placement and IEP were provided, the IEP team must then determine that the remaining two standards have been satisfied. This section is not intended to require an IEP team to find that a child's behavior was a manifestation of a child's disability based on a technical violation of the IEP or placement requirements that are unrelated to the educational/behavior needs of the child. (S. Rep. No. 105-17, p. 31; H. Rep. No. 109-95, pp. 110-111 (1997))

In light of the general decision to remove all notes from these final regulations, however, Note 1 should be removed.

Change: Note 1 has been removed.

Comment: Many commenters asked that the content of the first sentence of Note 2 be integrated into the regulations. The commenters were divided, however, over the second sentence of Note 2. Some supported the statement in the second sentence of the note, others wanted the sentence to be revised to specify that children with disabilities who have been placed in 45 day placements under §§ 300.520 and 300.521 must be returned to their regular placement if their behavior is determined to be a manifestation of their disability because of the principle that children with disabilities may not be disciplined for behavior that is a manifestation of their disability.

Still others wanted the sentence revised to indicate that changes to the child's IEP or placement or the implementation of either "could" as opposed to "often should" enable the child to return to the regular placement. Other commenters asked that the second sentence to Note 2 be removed as they believed that it was inconsistent with the authority granted in §§ 300.520 and 300.521 to change the placement of a child with a disability to an interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days. Other commenters asked that the regulations make clear that if behavior is a manifestation of the child's disability, disciplinary action cannot be taken against the child.

Discussion: For clarity, the regulation should specify that if the behavior is determined to be a manifestation of the child's disability, the public agency must take immediate steps to remedy any deficiencies found in the child's IEP or placement or their implementation. It would be inconsistent with the public agency's obligation to ensure the provision of FAPE to children with disabilities to fail to take appropriate action to correct identified deficiencies in a child's IEP or placement or the implementation of either.

The 45-day placements in §§ 300.520(a)(2), 300.521 and 300.526(c) are exceptions to the general rule that children with disabilities may not be disciplined through a change of placement for behavior that is a manifestation of their disability. If a child has been placed in a 45-day placement under one of these sections and his or her behavior is determined to be a manifestation of the disability under § 300.523, it may be possible to return the child to the current educational placement before the expiration of the up to 45-day period by correcting identified deficiencies in the implementation of a child's IEP or placement. However, public agencies are not obliged to return the child to the current placement before the expiration of the 45-day period (and any subsequent extensions under § 300.526(c)) if they do not choose to do so.

Consistent with the general decision to remove all notes from these final regulations, Note 2 would be removed.

Change: A new paragraph has been added to clarify that if deficiencies are identified in the child's IEP or placement or in their implementation, the public agency must act to correct those deficiencies. Note 2 has been removed.

Comment: Some commenters asked that the regulations provide distinctions between the types of services that must be provided in interim alternative educational settings when behavior is and is not a manifestation of the child's disability. For children whose behavior is not a manifestation of their disability, these commenters asked that FAPE be defined as the LEA's "core curriculum" (the basic courses needed to fulfill high school graduation requirements) unless the IEP team determined that some more extensive services are required, so that it would be clear that the LEA would not have to duplicate every possible course offering at the alternative site. The commenters asked that this rule also apply to the services provided to children who have properly been long-term suspended or expelled for behavior that is determined not to be a manifestation of disability.

For children whose behavior is determined to be a manifestation of disability, these commenters asked for clarification that an IEP team can still take disciplinary action, if the IEP team feels that providing consequences is appropriate. In addition, they asked that the regulations make clear that an IEP team can change a student's placement for behavior that is a manifestation of the disability, if taking such action would be appropriate and consistent with the student's needs.

Discussion: A manifestation determination is necessary to determine whether the placement for a child with a disability can be changed over the objections of the child's parents through a long-term suspension (other than the 45-day placement addressed in §§ 300.520, 300.521 and 300.526(c)) or an expulsion. However, there is no basis in the statute for differentiating the services that must be provided to children with disabilities because their behavior is or is not a manifestation of their disability. (See discussion of comments for §§ 300.121 and 300.522 for further discussion about services during periods of disciplinary removal).

Under section 504 of the Rehabilitation Act of 1973, if the behavior is a manifestation of a child's disability, the child cannot be removed from his or her current educational placement if that removal constitutes a change of placement (other than a 45 day placement under §§ 300.520(a)(2), 300.521, and 300.526(c)), unless the public agency and the parents otherwise agree to a change of placement. If the behavior is related to the child's disability, proper development of the child's IEP should include development of strategies, including positive behavioral interventions, strategies and supports to address that behavior, consistent with §§ 300.346(a)(2)(i) and (c). If the behavior is determined to be a manifestation of a child's disability but has not previously been addressed in the child's IEP, then the IEP team must meet to review and revise the child's IEP so that the child will receive services appropriate to his or her needs. Implementation of the behavioral strategies identified in a child's IEP, including strategies designed to correct behavior by imposing consequences, is appropriate under the IDEA and section 504, even if the behavior is a manifestation of the child's disability. However, if a child's IEP includes behavioral strategies to address a particular behavior of the child, the appropriate response to that behavior almost always would be to use the behavioral strategies specified in the IEP rather than to implement a disciplinary suspension. A change in placement that is appropriate and consistent with the child's needs may be implemented subject to the parent's procedural safeguards regarding prior notice (§ 300.503), mediation (§ 300.506), due process (§§ 300.507–300.513) and pendency (§ 300.514).

Change: None.

Comment: Several commenters noted that a manifestation review should not be required prior to determining punishment for incarcerated students because prison disciplinary infractions raise bona fide security and compelling penological interests that are outside the purview of the education staff. However, commenters noted that a manifestation review for these students may be useful in developing appropriate behavior interventions.

Discussion: Section 614(d)(6)(B) of the Act provides that for children with disabilities who are convicted as adults under State law and incarcerated in an adult prison, the child's IEP team may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. (See also § 300.311(c)(1)). A manifestation determination would still be required for these individuals, in the instances specified in paragraph (a) of this section.

Change: None.

Comment: Several additional notes were proposed. Several commenters asked that a note be added to clarify that when a student with disabilities has been properly expelled, the student does not have to petition for readmission when the period of expulsion ends as the school system must accept and serve the student in its schools. Others asked for a note specifying that under section 504 of the Rehabilitation Act children with disabilities may not be disciplined for behavior that is a manifestation of their disability, and that prior to taking any punitive action against a child with a disability, appropriate personnel must determine that the behavior in question is not a manifestation of the child's disability.

Discussion: No new notes will be added. All notes are being removed from these final regulations. Whether a student who has been properly expelled must petition for readmission when the period of expulsion ends generally will depend on how the public agency deals with children without disabilities who return to school after a period of expulsion. However, public agencies are reminded that for children with disabilities, they have an ongoing obligation to make a FAPE available, whether the child is expelled or not. Under Section 504 of the Rehabilitation Act of 1973, children with disabilities may not be disciplined for behavior that is a manifestation of their disability if that disciplinary action constitutes a change of placement. That principle is consistent with the changes made in this section.

Change: None.

Determination That Behavior Was Not Manifestation of Disability (§ 300.524)

Comment: Some commenters asked that the regulations make clear that if the behavior was not related to the child's disability the discipline could include long-term suspensions and expulsions. Others asked that the regulations clarify whether discipline would be limited to the 45-day interim alternative educational placement or would be the same disciplinary measures as for nondisabled students as long as FAPE is provided and IEP services continued in another setting. Others thought that the regulation should specify that no suspension or expulsion could be for more than 45 days. Some commenters asked for clarification of what would constitute an acceptable alternative setting for children whose behavior is determined to not be a manifestation of their disability.

Several commenters requested that the regulations delete the provisions of paragraph (c) of this section concerning placement pending a parent appeal of a manifestation determination and the note following, which addresses paragraph (c). Others stated that the regulations should specify that if parents challenge a manifestation determination, the child should remain in the alternative educational setting until the resolution of that challenge. Still others asked that the note mention that under § 300.514, placement could change if the parent and agency agreed to that other placement.

Discussion: Under this section, if a determination is made consistent with § 300.523 that a child's behavior is not a manifestation of his or her disability, the child may be subject to the same disciplinary measures applicable to nondisabled children, including long-term suspensions and expulsions, except that FAPE must be provided consistent with section 612(a)(1) of the Act. In these instances, the disciplinary removal from a regular placement could be as long as the disciplinary exclusion applied to a nondisabled child, and need not be limited to a 45-day interim alternative educational placement, except that appropriate services must be provided to the child. To make the point more clearly that if the behavior is determined not to be a manifestation of the child's disability, that child may be subjected to long-term suspension and expulsion with appropriate services. To clarify what would constitute an acceptable alternative setting for a child if the child's behavior is determined to not be a manifestation of his or her disability, the reference in paragraph (a) of this section has been changed to refer to § 300.121(c), which implements that statutory provision.

Section 615(j) of the Act provides that the only exceptions to the "pendency" rule (§ 300.514) are those specified in section 615(k)(7) of the Act, concerning placement during parent appeals of 45-day interim alternative educational placements, which is implemented by § 300.526. Paragraph (c) of this section merely reflects that statutory arrangement. Section 300.526 governs a child's placement if a parent challenges a manifestation determination while a child is in a 45-day interim alternative educational placement under §§ 300.520(a)(2) or 300.521. Section 300.514 makes clear that placement may change if the agency and parent agree on an alternative placement while a due process hearing is pending on other issues.

Changes: The reference to section 612(a)(1) of the Act in paragraph (a) is replaced with a reference to § 300.121(c), paragraph (c) is revised to refer to the placement rules of § 300.526, and the note is removed.

Parent Appeal (§ 300.525)

Comment: Some commenters asked that the regulations specify that parents must request a hearing in writing under this section. Other commenters asked that the regulations make clear that any hearing requested under this authority must be expedited, rather than suggesting that only those hearings when the parent requests an expedited hearing.

Some commenters wanted the regulations to reflect that mediation was an alternative to the expedited hearing procedure and encourage parents to seek mediation before an expedited hearing. Some asked that the regulations make clear that a parent's request for an expedited hearing would not apply to removals for less than 10 days and would not negate the discretion of school districts to use alternative judicial remedies, such as temporary restraining orders. Some commenters noted that paragraph (a)(1) of this section should be revised to apply only to placements made pursuant to the discipline provisions of the Act, and not other placement issues under the Act.

Several commenters asked that proposed paragraph (b)(2) of this section be revised to make clear that the standard of § 300.521 that is to be applied to 45-day placements under § 300.520(a)(2) is the "substantial evidence" standard and does not include the "substantially likely to result in injury" test or other program factors in § 300.521, so as not to damage the new ability of school districts to move students for up to 45 days for certain offenses related to weapons and drugs.

Discussion: The statute does not specify that parents request a hearing in writing under the appeal procedures in this section. The statute provides for expedited hearings in three circumstances, and those are reflected in §§ 300.521, 300.525, and 300.526. Mediation is always encouraged as an alternative to a due process hearing, and § 300.506(a) makes clear that mediation must be available whenever a hearing is requested under the provisions of §§ 300.520–300.528. Under the statute, it seems clear that a parent's right to an expedited hearing is limited to placements pursuant to the discipline provisions of the Act and not to other placement issues, such as disputes about the adequacy of a child's current placement (unless raised in the context of a manifestation issue).

In addition, since the statute refers to decisions regarding placement, rather than to disciplinary actions, a parent's right to an expedited hearing is limited to disciplinary situations involving a change of placement, which would occur if a child were removed from the child's current placement for more than 10 school days at a time or if there were a series of removals from the child's current educational placement in a school year as described in § 300.519. A parent's request for an expedited due process hearing does not prevent a school district from seeking judicial relief, through measures such as a temporary restraining order, when necessary.

The provisions of paragraph (b) of this section are statutory. Section 615(k)(6)(B)(ii) does not refer solely to the "substantial evidence" test in section 615(k)(2)(A), but to all the "standards" in section 615(k)(2)(§ 300.521 of these regulations).

Changes: Paragraph (a)(1) has been changed to refer to any decision regarding placement under §§ 300.520–300.528.

Placement During Appeals (§ 300.526)

Comment: Several commenters requested that paragraph (a) of this section be amended by specifying that a parent's appeal of a hearing officer decision must be heard by another hearing officer. Some commenters thought that LEAs should not be required to seek expedited hearings for students that remain a danger after 45 days and sought a simplified procedure for extensions of the 45-day placement.

Others thought that the possibility of an extension of an interim alternative educational placement because a child remains dangerous should be limited to a one-time extension that would require the hearing officer to determine that there were no programmatic changes, related services or supplemental aids or services that could be used to mitigate the dangerousness of the original placement. These commenters thought that any further efforts to keep the student in an alternative placement should be heard by a court. Some commenters asked that the note be deleted or modified by requiring, for example, that for an extension the hearing officer consider whether the school district has created delays or otherwise not acted in good faith. A few commenters asked that any time an agency sought to extend an interim alternative education placement because of continued dangerousness, the agency first conduct a formal evaluation of the child.

Discussion: It is not necessary to change the regulation to specify that a parent's appeal of a hearing officer's decision must be heard by another hearing officer, as it would violate the basic impartiality requirement of § 300.508(a)(2) to permit a hearing officer to hear the appeal of his or her prior decision. Under paragraph (b) of this section, unless shortened as the result of a hearing officer's decision consistent with paragraph (a) of this section, a child would remain in the interim alternative educational setting pursuant to §§ 300.520(a)(2) or 300.521 for the period of the exclusion (which may be up to 45 days).

If the public agency proposes to change the child's placement at the end of that interim alternative educational placement and the child's parents request a due process hearing on that proposed change of placement, the child returns to the child's placement prior to the interim alternative educational setting at the end of that interim placement, except as provided in paragraph (c) of this section. The expedited hearing procedure set forth in paragraph (c) of this section is drawn from the statute, which contemplates the same standards for these expedited hearings as for those under §300.521.

There is no statutory limit on the number of times this procedure may be invoked in any individual case, and none is added to the regulation. If, after a 45-day extension of an interim placement under paragraph (c) of this section, an LEA maintains that the child is still dangerous and the issue has not been resolved through due process, the LEA may seek subsequent expedited due process hearings under paragraph (c)(1) of this section. However, in light of the decision to remove all notes from the regulations, the note would be removed.

Changes: A new paragraph (c)(4) has been added to make clear that the procedure in paragraph (c) may be repeated, if necessary. The note has been removed.

Protection for Children not yet Eligible for Special Education and Related Services (§300.527)

Comment: A number of commenters expressed concern that the statutory language that was reflected in paragraph (b) of this section was too broad and thought that reasonable restrictions should be added so that the issue of whether a "basis of knowledge" existed would not have to be litigated for almost any child who was subjected to disciplinary action.

With respect to paragraph (b)(1), some commenters requested that written parent concerns should be addressed to the director of special education, other special education personnel of the agency, or the child's teacher rather than to noninstructional personnel or personnel not normally charged with child find responsibilities. Other commenters asked that paragraph (b)(1) make clear that the parental expression of concern must be more than a casual observation or vague statement and must describe behavior indicative of a disability or reflect the need for a special education evaluation. Other commenters asked for specificity about how the determination about parents' English literacy would be determined and asked that parental illiteracy in English be rephrased as being unable to write.

Some commenters asked that paragraph (b)(2) clarify the type, severity, or degree of behavior or performance that would demonstrate the need for services under the Act. For example, some asked that the behavior or performance of the child would have to include characteristics consistent with a category of disability under §300.7 of the regulations. Others asked that this provision be revised to require observation and documentation of the child's performance or behavior demonstrating the need for special education services by personnel who regularly work with the child.

Some commenters requested that various sections of paragraph (b) be time-limited to actions within the past year. Others asked that all of paragraph (b) be limited to actions that have occurred within the preceding two school years.

With respect to paragraph (b)(4) of this section, many commenters asked that the regulations make clear that casual communications between agency personnel would not meet this standard. Some thought that the agency personnel covered by this provision should be limited to those providing regular or special education to the child reporting concern to agency personnel who are normally responsible for initiating the special education evaluation process. Others asked that expressions of concern by appropriate agency personnel be a written expression of the child's need for a special education evaluation. Some noted that without the addition of reasonable limitations, this provision would undermine responsible efforts, such as pre-referral strategies, to limit identification of children for special education.

Some commenters asked that paragraph (b) make clear that an agency would not be considered to have a "basis of knowledge" merely because a child is receiving services under some other program such as Title 1 of the Elementary and Secondary Education Act, a State- or locally-developed compensatory education program, or consistent with Section 504 of the Rehabilitation Act of 1973. Others asked that the regulations specify that if an evaluation has been done and a child found ineligible for special education, that evaluation and determination would not constitute a "basis of knowledge" under paragraph (b). Others asked that agencies be able to demonstrate that they responsibly addressed an expression of concern and concluded that the available data were sufficient to determine that there was no reason to evaluate the child.

Discussion: In light of these comments, some changes would be made to paragraph (b) of this section. With respect to paragraph (b)(1) of this section, it is important to keep in mind that child find is an important activity of school districts under the Act and all of the staff of a school district should be at least aware enough of this important school function that, whatever their role in the school, if they receive a written expression of concern from a parent that a child is in need of special education and related services, a referral to appropriate school child find personnel should be made. Parents should not be held accountable for knowing who in a school is the proper person to contact if they are concerned that their child might need special education. On the other hand, the statute makes clear that the parental expression of concern must include enough information to indicate that their child is in need of special education and related services. The statutory provision expects that parents provide their expressions of concern in writing if they are able to and does not mention a particular language. Rather than refer to illiteracy; which may have a variety of interpretations, the regulations should refer to the parent not knowing how to write.

In paragraph (b)(2) of this section, the behavior or performance of the child sufficient to meet this standard should be tied to characteristics associated with one of the disability categories identified in the definition of child with a disability in order to remove unnecessary uncertainty about the type, severity, or degree of behavior or performance intended. Child find is an important function of schools and school districts.

School personnel should be held responsible for referring children for evaluation when their behavior or performance indicates that they may have a disability covered under the Act. Limiting paragraph (b)(2) to instances in which personnel who regularly work with the child have recorded their observation of a child's behavior or performance that demonstrates a need for special education would inappropriately omit those situations in which public agency personnel should have acted, but failed to do so.

Requested changes regarding time limitations on the standards in paragraph (b) are not adopted. However, if as a result of one of the forms of notice identified in this paragraph, a public agency has either determined that the child was not eligible after conducting an evaluation or determined that an evaluation was not necessary, and has provided appropriate notice to parents of that determination consistent with § 300.503, the public agency would not have a basis of knowledge under this paragraph because of that notice. For example, if as the result of a parent request for an evaluation, a public agency conducted an evaluation, determined that the child was not a child with a disability, and provided proper notice of that determination to the parents, the agency would not have a basis of knowledge because of that parent request for an evaluation.

If the parents disagreed with the eligibility determination resulting from that evaluation, they would have the right to request a due process hearing under § 300.507. If the parents requested a hearing, the protections of this part would apply. If they did not request a hearing and the child subsequently engaged in behavior that violated any rule or code of conduct of the public agency, including behavior described in §§ 300.520 or 300.521, and there was no intervening event or action that would independently constitute a basis of knowledge under paragraph (b), the public agency would not be deemed to have knowledge (of a disability). In such a case, consistent with paragraph (c), the parents could request an expedited evaluation, but the public agency could subject the child to the same disciplinary measures applied to children without disabilities engaging in comparable behavior. An addition would be made to this section. In order to clarify that if an agency responsibly addresses the behavior or performance of a child or an expression of concern about that behavior or performance the agency's knowledge of that behavior, performance or expression of concern, does not preclude the agency from subjecting the child to the same disciplinary measures applied to children without disabilities who engage in comparable behaviors.

In order to provide clarity to the content of paragraph (b)(4), a change has been made to that provision. Public agencies should not be held to have a basis for knowledge that a child was a child with a disability merely because the child's teacher had expressed concern about the child's behavior or performance that was unrelated to whether the child had a disability. This provision would therefore be modified to refer to expressions of concern to other agency personnel who have responsibilities for child find or special education referrals in the agency.

The changes described in this discussion in regard to paragraph (b)(2) and (b)(4) would clarify that a public agency will not be considered to have a basis of knowledge under paragraph (b) of this section merely because a child receives services under some other program designed to provide compensatory or remedial services or because a child is limited-English proficient. If the child is eligible under section 504 and not the IDEA, discipline would have to be consistent with the requirements of section 504.

Changes: A technical change has been made to paragraph (a) to refer to paragraph (b) of this section rather than "this paragraph." The parenthetical language in paragraph (b)(1) has been replaced with the following statement: "(or orally if the parent does not know how to write or has a disability that prevents a written statement)." Language is added to paragraph (b)(2) to clarify that the behavior or performance is in relation to the categories of disability identified in § 300.7; and paragraph (b)(4) has been revised to refer to other personnel who have responsibilities for child find or special education referrals in the agency. Paragraph (c) has been redesignated as paragraph (d) and a new paragraph (c) has been added to provide that if an agency acts on one of the bases identified in paragraph (b), determines that the child is not eligible, and provides proper notice to the parents, and there are no additional bases of knowledge under paragraph (b) that were not considered, the agency would not be held to have a basis of knowledge under § 300.527(b).

Comment: Some commenters thought that paragraph (c) of this section in the NPRM implied that a regular education child is entitled to some placement while eligibility is being determined, and thought that whether these students receive services while eligibility is being determined should be left to the States. Others asked that the regulations specify that the phrase "educational placement" in proposed paragraph (c)(2)(ii) includes a suspension or expulsion without services, while others thought that any disciplinary action should be put on hold until the evaluation was completed. Others asked that parents be involved in decisions about the child's educational placement under this provision.

Some commenters thought that more guidance should be provided about an appropriate timeline for an expedited evaluation. Others asked that an expedited evaluation when an agency had conducted an evaluation within the past year could be reviewing those results and determining whether other assessments would need to be conducted. Other commenters wanted the regulations to make clear that a parent would have the right to an independent educational evaluation if the parent disagrees with the evaluation results and to the standard appeal rights and that a court could enjoin improper exclusion during the pendency of the evaluation and appeal process.

Discussion: Redesignated paragraph (d) of this section does not require the provision of services to a child while an expedited evaluation is being conducted, if the public agency did not have a basis for knowledge that the child was a child with a disability. An educational placement under paragraph (d)(2)(ii) in those situations can include a suspension or expulsion without services, if those measures are comparable to measures applied to children without disabilities who engage in comparable behavior. Of course, States and school districts are free to choose to provide services to children under this paragraph.

There is no requirement that a disciplinary action be put on hold pending the outcome of an expedited evaluation, or that the child's parents be involved in placement decisions under paragraph (d)(2)(ii).

No specific timeline for an expedited evaluation is included in the regulations, as what may be required to conclude an evaluation will vary widely depending on the nature and extent of a child's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, the statute and regulation specify that the evaluation in these instances be "expedited", which means that an evaluation should be conducted in a shorter period of time than a normal evaluation. As § 300.533 makes clear, in some cases, an evaluation may be conducted based on a review of existing data.

With regard to an expedited evaluation, a parent's right to an independent educational evaluation if they disagree with the results of that evaluation and to normal appeal rights of that expedited evaluation are not affected by this section. Courts have the ability to enjoin improper exclusion of children from educational services in appropriate circumstances.

Changes: Language has been added to paragraph (d)(2)(ii) to make clear that an educational placement under that provision may include suspension or expulsion without educational services.

Expedited due Process Hearings (§ 300.528)

Comment: Some commenters supported the time frames proposed for expedited due process hearings in light of the need to get prompt resolution of the various issues that are subject to these hearings. A number of commenters expressed concern about being able to meet the timelines proposed in paragraph (a) and suggested that the expedited hearing timeline be set at some longer time such as 10 school days, 15 calendar days, 20 business days, or 20 school days, so that an orderly hearing could be conducted, the parties' rights protected, and a well-reasoned and legally sufficient decision could be rendered.

Some commenters thought that this section should refer to "expedited hearings" rather than "expedited due process hearings." Others noted the obligation of a hearing officer to schedule the hearing quickly so that a decision could be reached within the time frame. Some commenters asked that a provision be added to specify that if a decision was not rendered within the time frame, the child would remain in the alternative placement until the decision was issued, while others asked that the child be returned to the regular placement if the decision were not issued within that time frame.

Some commenters were concerned that the provision proposed in paragraph (b) not be read to reduce rights available to children and parents under the law, and asked that a statement be added to the regulation to specify that in no instance should the protections afforded the student and parent under the Act be reduced.

Some commenters asked that paragraph (c) provide an expedited appeal process as well in light of the statutory emphasis on quick resolution of disputes about disciplinary actions. Some commenters asked that the regulations make clear that appeals of disputes under §§ 300.520–300.528 are to a State level review officer, if a State has a two-tier due process system, and not to another due process hearing officer.

Discussion: Because of concerns that in some States it will not be possible to conduct an orderly hearing and develop a well-reasoned, legally sufficient decision within a 10 business day timeline, the specific time limit would be removed and replaced with a requirement that States establish a timeline for expedited due process hearings that meet certain standards—it must result in written decisions being mailed to the parties in less than 45 days, with no extensions of time that result in a decision more that 45 days from the date of the request for a hearing, and it must be the same period of time, whether the hearing is requested by a public agency or parent. This will allow States to develop a rule that is fairly applied to both parents and school districts and is best suited to their particular needs and circumstances.

The regulations refer to expedited due process hearings rather than expedited hearings to make clear that the procedural protections in §§ 300.508 and 300.509 are to be met. With regard to the hearings provided for in section 615(k)(2) of the Act (§ 300.521 of the regulations), the Committee reports accompanying Pub. L. 105–17 refer to the hearings as "expedited due process hearings." (S. Rep. No. 105–17, p. 31, H.R. Rep. No. 105–95 p. 111 (1997)) In addition, the evidentiary standard specified in the statute for hearings under §§ 300.521 and 300.526(c) requires consideration of evidence presented by both sides to a dispute, which rules out hearings which do not permit each side an equal opportunity to present evidence. Permitting a different standard to apply to expedited hearings on parent appeals under § 300.526(a) would be unfair to public agencies. If a decision is not reached within the time frame specified, the child's placement would be determined based on the other rules provided in these regulations. For example, if a school district had requested a hearing for the purpose of demonstrating that a child was substantially likely to injure themselves or others if the child remained in the current placement, the child could be removed from his or her current placement for not more than 10 school days pending the decision of the hearing officer, unless the child's parents and the public agency agreed otherwise. (§ 300.519).

If the child were in a 45-day interim alternative educational setting and the parents appealed that determination, the child would remain in that setting until the expiration of the 45 days or the hearing officer's decision, whichever occurs first. (§ 300.526(a)). If the child's parents oppose a proposed change of placement at the end of a 45-day interim alternative educational setting, under § 300.526(b), the child returns to the child's prior placement at the end of the interim placement, unless through another hearing and decision by the hearing officer under § 300.526(c), the interim alternative educational setting is extended for an additional period of time, not to exceed 45 days for each expedited hearing requested under § 300.526(c).

Paragraph (b) of this section is designed to make clear that while a State must insure that expedited due process hearings must meet the requirements of paragraph (a) of this section, the State may alter other State-imposed procedural rules from those it uses for hearings under § 300.507. This rule will ensure that the basic protections regarding hearings under the Act are met, while enabling States to adjust other procedural rules they may have superimposed on due process hearings in light of the expedited nature of these hearings.

No specific expedited appeal process is specified in the Act, and none is added by these regulations. However, States should be able to choose to adopt an expedited appeal procedure if they wish, including, in States that have a two-tier normal due process procedure, establishing a one-tier expedited hearing procedure (*i.e.*, expedited hearings conducted by the SEA) so that parties resort directly to a State or Federal court, rather than appeal through a State-level appeal procedure. Therefore, a change should be made to the regulation to clarify that an appeal of an expedited due process hearing must be consistent with § 300.510.

Changes: A technical change has been made to paragraph (a)(2) to refer to § 300.509 rather than § 300.508. Paragraph (a)(1) has been deleted and a new paragraph (b) has been added to provide that each State establish a timeline for expedited due process hearings that results in a written decision being mailed to the parties within 45 days, with no extensions permitted that result in decisions being issued more than 45 days after the hearing request; and to require that decisions be issued in the same period of time, whether the hearing is requested by a parent or an agency. Paragraphs (a)(2) and (a)(3) have been redesignated as paragraphs (a)(1) and (a)(2) and paragraphs (b) and (c) have been redesignated as paragraphs (c) and (d). Redesignated paragraph (d) has been revised to specify that expedited due process hearings are appealable consistent with the § 300.510. A modification has been made to § 300.526(a) regarding these appeals.

Referral to and Action by Law Enforcement and Judicial Authorities (§ 300.529)

Comment: Several commenters asked that paragraph (a) be modified to clarify that reporting crimes to law enforcement authorities not circumvent the school's responsibilities under IDEA to appropriately evaluate and address children's behavior problems that are related to their disabilities in a timely manner. Other commenters requested that procedural safeguards similar to those in §§ 300.520–300.528 be incorporated into this section that would apply whenever an agency makes a report of a crime by a child with a disability, including conducting a manifestation determination on the relationship of the behavior to the disability, applying the 10- and 45-day timelines to any criminal or juvenile filing, notice to parents, and the right of parents to appeal decisions and request due process. Some commenters stated that any referral to juvenile or law enforcement authorities should trigger notice to parents of the referral.

Several commenters requested that the regulations specify that the Act also permits school officials to press charges against a child with a disability when they have reported a crime by that student.

One commenter asked that paragraph (a) be modified to require that a police report include a statement indicating that the student is in a special education program and identify a contact person who can provide additional information to appropriate authorities on request.

Discussion: Paragraph (a) of § 300.529 does not authorize school districts to circumvent any of their responsibilities under the Act. It merely clarifies that school districts do have the authority to report crimes by children with disabilities to appropriate authorities and that those State law enforcement and judicial authorities have the ability to exercise their responsibilities regarding the application of Federal and State law to crimes committed by children with disabilities. The procedural protections that apply to reports of a crime are established by criminal law, not the IDEA. Of course, it would be a violation of Section 504 of the Rehabilitation Act of 1973 if a school were discriminating against children with disabilities in how they were acting under this authority (*e.g.*, if they were only reporting crimes committed by children with disabilities and not committed by nondisabled students).

The Act does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student. Again, school districts should take care not to exercise their responsibilities in a discriminatory manner.

With regard to indicating that a student is a special education student and identifying a contact person who can provide appropriate information to authorities to whom a crime is reported, as explained more fully in the discussion on § 300.529(b), under the confidentiality requirements of these regulations (see, *e.g.*, § 300.571) and those of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g), personally identifiable information (such as a student's status as a special education student) can only be released with parental consent except in certain very limited circumstances.

Changes: None.

Comment: A number of commenters asked that paragraph (b) of this section include a reference to the requirements of FERPA and note that public agencies must insure the confidentiality of records such as the special education and disciplinary records referred to in this section. Some asked that a provision be added making clear that a release to law enforcement authorities could only be made pursuant to the requirements of FERPA. Others asked whether this provision constituted an exception to disclosure of education records under FERPA, and if so, that the regulations make this clear. Some commenters noted that disclosure of education records would be a significant burden on schools and that it contradicts existing confidentiality and disclosure requirements. Some commenters were concerned that other agencies would not maintain these records in a way that would protect the often very sensitive information that they contain.

Discussion: Under sections 612(a)(8) and 617(c) of the Act, the Secretary is directed to take appropriate action, in accordance with FERPA to assure the confidentiality of personally identifiable information contained in records collected or maintained by the Secretary and by SEAs and LEAs (see §§ 300.127, and 300.560–300.577). The provisions of section 615(k)(9)(B) of the Act as reflected in paragraph (b) of this section must be interpreted in a manner that is consistent with the requirements of FERPA, and not as an exception to the requirements of that law. In other words, the transmission of special education and disciplinary records under paragraph (b) of this section is permissible only to the extent that such transmission is permitted under FERPA.

If section 615(k)(9)(B) of the Act were construed to require, or even permit, disclosures prohibited by FERPA, it arguably would violate the equal protection rights of children with disabilities to be protected against certain involuntary disclosures to authorities of their confidential educational records to the same extent as their nondisabled peers. To avoid this unconstitutional result, this statutory provision must be read consistent with the disclosures permitted under FERPA for the education records of all children.

FERPA would permit disclosure of the special education and disciplinary records mentioned in § 300.529(b) only with the prior written consent of the parent or a student aged 18 or older, or where one of the exceptions to FERPA's consent requirements apply. (See also, § 300.571). For example, disclosure of special education and disciplinary records would be permitted when the disclosure is made in compliance with a lawfully issued subpoena or court order if the school makes a reasonable attempt to notify the parent of the student of the order or subpoena in advance of compliance. (34 CFR 99.31(a)(9)). This prior notice requirement allows the parent to seek protective action from the court, such as limiting the scope of the subpoena or quashing it. Prior notice is not required when the disclosure is in compliance with certain Federal grand jury or other law enforcement subpoenas. In these cases, the waiver of the advance notification requirement applies only when the law enforcement subpoena or court order contains language that specifies that the existence or the contents of, or the information furnished in response to, such subpoena or court order should not be disclosed. (34 CFR 99.31(a)(9)(ii)). Additionally, under FERPA, if the disclosure is in connection with an emergency and knowledge of the information is necessary to protect the health or safety of the student or other individuals (34 CFR 99.31(a)(10) and 99.36), disclosure may be made without parental consent. In addition, schools may disclose education records without consent if a disclosure is made pursuant to a State statute concerning the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released. The State statute must create an information sharing system, consisting only of State and local officials, that protects against the redisclosure of a juvenile's education records. (34 CFR 99.31(a)(5) and 99.38). For additional information on the juvenile justice system provision and other provisions under FERPA, refer to the U.S. Department of Education/U.S. Department of Justice publication entitled *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs*. The publication can be downloaded from the Family Policy Compliance Office's web site: www.ed.gov.office/OM/fpco

In some instances, however, the Part 300 regulations are more restrictive than FERPA. For example, the Part 300 regulations in the past prohibited disclosures without parent consent to outside entities that FERPA would permit. (See proposed § 300.571(a) limiting disclosures without consent to officials of participating agencies collecting or using the information under IDEA and requiring consent before information is used for any purpose other than meeting IDEA requirements.) Section 615(k)(9)(B) of the Act now eliminates, with regard to children with disabilities who are accused by schools of crimes, IDEA restrictions on the sharing of information that is permissible under FERPA.

Except in certain limited situations, information from special education and disciplinary records may be disclosed only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent. (34 CFR 99.33). This procedure should be sufficient to ensure that those other parties maintain the records in a manner that will protect the confidentiality of that information.

Changes: Paragraph (b) of this section has been amended to make clear that copies of a child's special education and disciplinary records may be transmitted only to the extent that such transmission is permitted under FERPA. Section 300.571 has been amended to note the exception of this section.

Comment: Some commenters asked that the regulations provide further clarification about the disclosure of information described in paragraph (b) by, for example, clarifying whether a request from a law enforcement official is needed before a transfer, whether the LEA would be permitted to determine the most appropriate official to receive the records, and if all or part of the record is transmitted. Others asked that the regulations specify that the records be transferred within a short period of time so that they would be available for consideration in decisions about the student's case or that some limitations be imposed on what is transferred, such as records covering the past year, or "relevant" records.

Some commenters asked that the regulations impose some limitations on this responsibility by defining "appropriate authorities," "special education record," and "disciplinary record." Others asked that the regulations require SEAs to develop procedures regarding the disclosure of education records to the appropriate authorities when LEAs report a student's criminal activity because States' juvenile law and criminal law enforcement systems are different.

A few commenters asked that the agency reporting a crime be responsible for ensuring that the child continues to receive FAPE in accordance with the child's IEP with consultation with law enforcement, judicial authorities, or any other agency responsible for the education of incarcerated youth.

Discussion: As explained in the prior discussion, FERPA limits the extent to which disclosure of special education and disciplinary records would be permitted. The circumstances that determine whether records may be transmitted generally will determine whether a specific request from a law enforcement official would need to be made, to whom the records would be transmitted and the extent of the information provided. In light of the fact-specific nature of the analysis required, no specific definitions of terms used in paragraph (b) are provided. The requirements of FERPA and its implementing regulations at 34 CFR Part 99 provide more specific guidance. The agency that is responsible to ensure that a child receives FAPE when the child has been accused of a crime and is in the custody of law enforcement and judicial authorities will be determined by State law.

Changes: None.

Procedures for Evaluation and Determination of Eligibility

Initial Evaluation (§ 300.531)

Comment: A few commenters requested that this section be revised to clarify that parents may request an initial evaluation, and some requested that public agencies be required to conduct an initial evaluation upon parent request. A few commenters requested that the regulation be revised to require that, upon parent request, an initial evaluation include new testing in all areas of suspected disability, even if a determination is made, under § 300.533(a), that no additional data are needed. A few commenters requested that the regulation be revised to specify the types of indicators, such as a psychiatric hospitalization, that trigger the requirement that a child be evaluated for possible disability.

Other commenters requested that the regulation be revised to clarify that initial evaluations are distinct from reevaluations, and to require that initial evaluations be "comprehensive," and include a complete full and individual evaluation of the child in all areas of suspected disability. A few commenters requested that § 300.531 be linked with § 300.532(g), to make clear that a "full and individual initial evaluation" under § 300.531 means a comprehensive evaluation in all areas of suspected disability.

Discussion: The child find provisions of § 300.125 require that a public agency ensure that any child that it suspects has a disability is evaluated. Under both prior law and these regulations, if a parent requests an initial evaluation, the public agency must either: (1) provide the parents with written notice of the agency's proposal to conduct an initial evaluation if the agency suspects that the child has a disability and needs special education and related services; or (2) provide the parents with written notice of the agency's refusal to conduct an initial evaluation if it does not suspect that the child has a disability. The parent may challenge such a proposal or refusal by requesting a due process hearing.

If a group decision is made under § 300.533(a) that no additional data are needed as part of an initial evaluation, the public agency is not required to conduct additional assessment as part of the initial evaluation; however, the parents may challenge that decision by initiating a due process hearing.

The child find provisions in section 612(a)(3) and in these regulations at § 300.125 require that all eligible children be identified, located and evaluated, and it is not necessary to establish additional requirements regarding specific circumstances that trigger an agency's responsibility to evaluate a child..

Any initial evaluation or reevaluation of a child with a disability must meet the requirements of § 300.532; therefore, a child with a disability must, as part of any initial evaluation or reevaluation, be assessed in all areas of suspected disability (§ 300.532(g)). However, as provided in § 300.533(a) and explained above, the public agency may not need to conduct assessment procedures to obtain additional data in one or more areas of suspected disability depending on what data are already available regarding the child.

Changes: None.

Comment: A few commenters requested that the regulations be revised to provide guidelines for State timelines for completing initial evaluations.

Discussion: This issue is addressed in the discussion regarding § 300.342.

Changes: None.

Evaluation Procedures (§ 300.532)

Comment: Some commenters requested that the regulation be revised to require that all tests and other evaluation materials and procedures that are used to assess a child, including nonstandardized tests, be validated for the specific purpose for which they are used and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests.

Other commenters asked that the regulation be revised to require that tests and other evaluation procedures be selected and administered so as not to be discriminatory on a disability basis, and to prohibit use of tests if there is controversy in the literature about a test's validity for use with children with a particular disability unless a local validation study has been conducted for the particular disability that the child is suspected to have. A few commenters requested that the regulation specify that evaluations that are conducted verbally should use the language normally used by the child and not the language used by the parents, if there is a difference between the two.

A few commenters requested that the regulation be revised to require that public agencies collect information regarding a child's learning style(s) and needed methodologies as part of an evaluation, because such information is critical in formulating appropriate instructional methods to promote the child's learning. A few commenters requested that the regulation be revised to require that three individuals from different disciplines evaluate each child. A few commenters requested that the regulation be revised to clarify that tests and other materials used in evaluating each child must include a full range of diagnostic techniques, including observations and interview. A few commenters requested that § 300.532(g) be revised to require a comprehensive evaluation for all students, regardless of their area of suspected disability, and a functional behavioral assessment for each child who exhibits behavior that impedes learning.

A few commenters requested that the regulation be revised to require that initial evaluations and reevaluations address all of the special factors that IEP teams must consider under § 300.346(a)(2). A few commenters asked that the regulation be revised to require that evaluations provide information to enable public agencies to comply with the requirements of § 300.534(b)(1), which requires that a child not be determined to be a child with a disability if the determinant factor is a lack of instruction in reading or math.

A few commenters requested that paragraphs (d), (e), and (f), and Notes 1, 2, and 3, be deleted because they exceed the requirements in the statute.

A few commenters were concerned that Note 2 does not address the broad array of unique circumstances in which it may be necessary, for communication or other disability-specific reasons, to seek out an appropriate evaluator who is not on the staff of the public agency.

A few commenters raised concerns about valid assessment of Native American children who are either Navajo-dominant speakers or bilingual. They expressed particular concern regarding the limitations of standardized written instruments in assessing children who speak Navajo, which is a predominantly oral language, and asked for guidance as to how Bureau of Indian Affairs schools will meet the requirements in § 300.532 regarding standardized assessment tools.

A few commenters were concerned that the reference in Note 3 to administration of assessment components by persons whose qualifications do not meet standard conditions would appear to "give permission" for the use of unqualified assessment personnel, and requested that this reference be deleted from the note. Other commenters asked that Note 3 be deleted because it inappropriately implies that IDEA permits public agencies to conduct assessments under "substandard" conditions.

Several commenters requested that the substance of all of the notes in the NPRM be incorporated into the text of the regulations, or that the notes be deleted in their entirety.

Discussion: The provisions of § 300.532(c) regarding requirements for standardized tests are consistent with section 614(b)(3)(B), which limits applicability of those requirements to standardized tests. The selection of appropriate assessment instruments and methodologies is appropriately left to State and local discretion.

A public agency must ensure that: (1) the IEP team for each child with a disability has all of the evaluation information it needs to make required decisions regarding the educational program of the child, including the consideration of special factors required by § 300.346(a)(2); and (2) the team determining a child's eligibility has all of the information it needs to ensure that the child is not determined to be a child with a disability if the determinant factor is a lack of instruction in reading or math, as required by § 300.534(b)(1). It is not, therefore, necessary to establish an additional requirement that evaluations address the requirements of § 300.346(a)(2) or § 300.534(b)(1).

Paragraphs (d), (e), and (f) were all among the provisions included in the regulations as in effect on July 20, 1983, and are unaffected by the IDEA Amendments of 1997.

In evaluating each child with a disability, it is important for public agencies to ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, including any needs the child has that are commonly linked to a disability category other than the disability in which the child has been classified. Further, public agencies must ensure that the services provided to each child under this part are designed to meet all of the child's identified special education and related services needs, and not those resulting only from the disability area in which the child has been initially classified.

As proposed Note 1 indicated, under Title VI of the Civil Rights Act of 1964: (1) in order to properly evaluate a child who may be limited English proficient, a public agency should assess the child's proficiency in English as well as the child's native language to distinguish language proficiency from disability needs; and (2) an accurate assessment of the child's language proficiency should include objective assessment of reading, writing, speaking, and understanding.

Both Title VI and Part B require that a public agency ensure that children with limited English proficiency are not evaluated on the basis of criteria that essentially measure English language skills. Sections 300.532 and 300.534(b) require that information about the child's language proficiency must be considered in determining how to conduct the evaluation of the child to prevent misclassification. In keeping with the decision to eliminate all notes from the final regulations, however, Note 1 has been removed. The text of § 300.532 has been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not instead measure the child's English language skills.

Proposed Note 2 explained that paragraphs (a)(1)(i) and (2)(ii) when read together require that even in situations where it is clearly not feasible to provide and administer tests in the child's native language or mode of communication for a child with limited English proficiency, the public agency must still obtain and consider accurate and reliable information that will enable the agency to make an informed decision as to whether the child has a disability and the effects of the disability on the child's educational needs. In some situations, there may be no one on the staff of a public agency who is able to administer a test or other evaluation in a child's native language, as required under paragraph (a)(2) of this section, but an appropriate individual is available in the surrounding area. In that case a public agency could identify an individual in the surrounding area who is able to administer a test or other evaluation in the child's native language include contacting neighboring school districts, local universities, and professional organizations. This information will be useful to school districts in meeting the requirements of the regulations, but consistent with the general decision to remove all notes, Note 2 would be removed.

An assessment conducted under non standard conditions is not in and of itself a "substandard" assessment. As proposed Note 3 clarified, if an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, needs to be included in the evaluation report. A provision has been added to the regulation to make this point.

This information is needed so that the team of qualified professionals can evaluate the effects of these variances on the validity and reliability of the information reported and to determine whether additional assessments are needed. Again, while the proposed note provided clarifying information on the regulatory requirements, in keeping with the general decision to eliminate notes, Note 3 would be removed.

The provisions of the Act and § 300.532, as revised to include a provision regarding the use of nonstandard assessments, are sufficient to ensure that the provisions of the regulation are appropriately implemented for Navajo children, and no further changes are needed.

Changes: Section 300.532 has been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not, instead, measure the child's English language skills.

A provision has been added to § 300.532 to require that if an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, must be included in the evaluation report. Notes 1, 2, and 3 have been removed.

A provision has been added to § 300.532 to require that the assessment be sufficiently comprehensive to identify all of a child's special education and related services needs. A change also has been made to § 300.300 clarifying that services provided to each child must be designed to meet all the child's identified special education and related services needs.

Paragraph (b) has been revised consistent with section 614(b)(2) of the Act, to clarify that information about enabling the child to be involved in and progress in the general curriculum or for a preschool child to participate in appropriate activities may assist in determining both whether the child has a disability and the content of the child's IEP.

Determination of Needed Evaluation Data (§ 300.533)

Comment: A few commenters requested that the regulation or a note clarify that it is expected that typically some new tests or assessments will be required as part of reevaluations. A number of commenters were concerned that, absent more specific requirements mandating the use of additional assessments, public agencies would rely on outdated assessment information regarding the needs of children with disabilities, especially since the needs of children with disabilities may change significantly over time, and some requested that the regulations be revised to define a maximum "age" for data that a public agency may rely upon as part of an evaluation. A few other commenters were concerned that the required IEP team participants often would not have the appropriate qualifications and expertise to judge the validity of existing data and to determine what if any additional data are needed.

A few others requested that the regulation be revised to require that a public agency collect additional data to determine whether a child continues to be a child with a disability, unless the agency obtains signed, informed parent consent to not collect such additional data, and that States be required to report on the number of such parent "waivers." Other commenters requested that the regulation or note clarify that the provisions of § 300.533(c) apply only to the portion of a reevaluation that addresses whether a child continues to be a child with a disability, and not the portion that addresses the child's needs for special education and related services.

A few commenters requested that parents be required to justify any request for additional assessment data. A few other commenters requested that public agencies be required to inform parents of their right to request additional assessments to determine whether their child has a disability.

A few commenters thought that is was important to clarify that a public agency may use data from prior assessments conducted by individuals or agencies other than the public agency in determining what additional data were needed.

Some commenters requested that the note be deleted.

Discussion: Whether additional data are needed as part of an initial evaluation or reevaluation must be determined on a case-by-case basis, depending upon the needs of the child and the information available regarding the child, by a group that includes the individuals described in § 300.344 and other qualified professionals, as appropriate.

It is intended that the group review all relevant existing evaluation data on a child, including that provided by the parents and, where appropriate, data from evaluations conducted by other agencies. A public agency must ensure that the group fulfilling these functions include individuals beyond those described in § 300.344 if necessary to ensure that appropriate, informed decisions are made (see § 300.533).

Requiring public agencies to obtain informed written consent permitting them not to collect, as part of a reevaluation, additional data to determine whether a child continues to be a child with a disability, would exceed the requirements of the statute, as would requiring States to report on the number of children for whom a reevaluation does not include collecting additional data to determine whether they continue to be children with disabilities.

The provisions of § 300.533(c) apply only to the collection of additional data needed to determine whether a child continues to be a child with a disability.

It would not be consistent with the statute and these regulations to require that parents "justify" any request for additional assessment data. Parents must be included in the group that reviews existing data and determines what additional data are needed, and, as part of that group, they have the right to identify additional assessment data that they believe are needed and to participate in the decision regarding the need for those data. Both the statute and these regulations require that the determination regarding the need for additional data be based, in part, on input from the parents. Under both the statute and these regulations, parents also have the right to request an assessment, as part of a reevaluation, to determine whether their child continues to have a disability under IDEA. However, this right is limited to determinations of eligibility for services under Part B. If the group reviewing the existing data does not believe additional data are needed to determine a child's continued eligibility under IDEA, but the parents want additional testing for reasons other than continued eligibility under IDEA, such as admission to college, the denial of the parent's request would be subject to due process.

An additional requirement that parents be informed of their right to request additional assessment data is not needed, as it is already addressed by paragraph (c)(1)(iii).

The proposed note clarified that the requirement in § 300.533(a) and § 300.534(a)(1) that review of evaluation data and eligibility decisions be made by groups that include "qualified professionals," is intended to ensure that the group making these determinations include individuals with the knowledge and skills necessary to interpret the evaluation data and make an informed determination as to whether the child is a child with a disability under § 300.7, and to determine whether the child needs special education and related services.

The composition of the group will vary depending upon the nature of the child's suspected disability and other relevant factors. For example, if a student is suspected of having a learning disability, a professional whose sole expertise is visual impairments would be an inappropriate choice. If a student is limited English proficient, it will be important to include a person in the group of qualified professionals who is knowledgeable about the identification, assessment, and education of limited English proficient students. While the proposed note provided clarifying information on the regulatory requirements, in keeping with the general decision to eliminate notes, the note would be removed.

Changes: The note has been removed. Paragraph (d) has been revised to clarify that the parent's right to request an evaluation regarding continued eligibility concerns services under Part B.

Comment: Some commenters requested that the regulation be revised to provide further guidance as to whether public agencies are required to convene a meeting to review existing evaluation data on a child and to determine what, if any, additional data are needed as part of the evaluation. A few commenters stated their opinion that the Congress did not intend to establish a new requirement for an additional meeting that public agencies must convene. Others asked for clarity as to whether a public agency could meet the requirements of § 300.533(a) by reviewing existing data and determining what additional data are needed as part of the child's IEP meeting during the second year of the three year evaluation cycle. A few commenters asked that the regulation be revised to require that parents are entitled to participate in any meeting held to review existing data.

A few other commenters requested that the regulation be revised to provide that only those members of the IEP team needed to review current goals and objectives must participate in the review of existing data, and that not all members involved in the initial placement need be involved unless there is to be a change in the placement or identification of the child.

Discussion: Section 300.533(a) requires that a group that includes the individuals described in § 300.344 (regarding the IEP team) and other qualified professionals, as appropriate, review the existing evaluation data and determine what additional data are needed. Although a public agency must ensure that the review of existing data and the determination of any needed additional data must be made by a group, including the parents, neither the statute nor these regulations require that the public agency conduct a meeting for this purpose. A State may, however, require such meetings.

Section 300.501(a)(2)(i) requires that parents have an opportunity to participate in meetings with respect to the evaluation of their child with a disability. Therefore, if a public agency conducts a meeting, as defined in § 300.501(b)(2), to meet its responsibilities under § 300.533, the parents must have an opportunity to participate in the meeting.

Neither the statute nor these regulations requires that all individuals who were involved in the initial placement of a child with a disability be part of the group that, as part of a reevaluation of the child reviews existing data and determines what additional data are needed. Both the statute and the regulations require, however, that a group that includes all of the individuals described in § 300.344 for an IEP meeting, and other qualified professionals, as appropriate, fulfill those functions.

Changes: Paragraph (a) has been revised to refer to the group that includes the individuals described in § 300.344 and other qualified individuals. A new paragraph (b) has been added to make clear that a meeting is not required to review existing evaluation data.

Determination of Eligibility (§ 300.534)

Comment: A few commenters requested that the regulation provide further guidance regarding the standards and process public agencies must use to ensure that lack of instruction in reading or math is not the determinant factor in determining that a child is a child with a disability. Other commenters requested that the regulation clarify that proposed § 300.534(b) does not mean that a child who has a disability and requires special education and related services because of that disability can be found ineligible simply because the child also has been denied instruction in reading or math or because the child has limited English proficiency.

Some commenters asked for clarification as to whether, if the group determines under § 300.533 that no further data are needed, a public agency may, without further evaluation, meet its obligation under proposed § 300.534(c) to evaluate a child with a disability before determining that the child is no longer a child with a disability.

A few commenters requested that the regulation be revised to clarify the meaning of "evaluation report." A few commenters requested that the regulation be revised to require that a public agency provide information to parents regarding the results of an evaluation prior to conducting an IEP meeting, and other commenters requested that the regulations specify a timeline for how quickly the public agency must provide parents with a copy of the evaluation report.

A few commenters asked for clarification as to whether a public agency must conduct an evaluation of a child with a disability before the agency may graduate the child. (This issue is addressed in the discussion regarding § 300.121.)

Discussion: The specific standards and process that public agencies use to ensure that lack of instruction in reading or math is not the determinant factor in determining that a child is a child with a disability, and the content of an evaluation report, are appropriately left by the statute to State and local discretion. However, a public agency must ensure that a child who has a disability, as defined in § 300.7 (i.e., a child who has been evaluated in accordance with §§ 300.530–300.536 as having one of the thirteen listed impairments, and who because of that impairment needs special education and related services) is not excluded from eligibility because that child also has limited English proficiency or has had a lack of instruction in reading or math. (See also § 300.532, which has been revised to require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not instead measure the child's English language skills.)

The specific content of an evaluation report is appropriately left by the statute to State and local discretion. Both the statute and the regulations require that, upon completing the administration of tests and other evaluation materials, a public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent, but neither establishes a timeline for providing these documents to the parents; rather, this timeline is appropriately left to State and local discretion. It is, however, important to ensure that parents and other IEP team participants have all the information they need to participate meaningfully in IEP meetings. Indeed, § 300.562(a) requires that a public agency comply with a parent request to inspect and review existing educational records, including an evaluation report, without unnecessary delay and before any meeting regarding an IEP.

A public agency must evaluate a child with a disability before determining that the child is no longer a child with a disability, but such a reevaluation is, like other reevaluations, subject to the requirements of § 300.533. Accordingly, if a group decision is made under § 300.533(a) that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency must provide parents with the notice required by § 300.533(d)(1), and must provide such additional assessment(s) upon parent request consistent with § 300.533(d)(2).

Changes: Paragraph (b) is revised to clarify that children are not eligible if they need specialized instruction because of limited English proficiency or lack of instruction in reading or math, but do not need specialized instruction because of a disability, as defined in § 300.7. See discussion of comments received under § 300.122 regarding a change to § 300.534(c).

Procedures for Determining Eligibility and Placement (§ 300.535)

Comment: Some commenters requested that parents be added to the variety of sources from which the public agency will draw, under § 300.535(a)(1), in interpreting evaluation data for the purpose of determining if a child is a child with a disability.

Discussion: The proposed change is consistent with section 614(b)(4)(A), which requires that the parent be part of the team that determines eligibility, and other provisions of the Act that stress the importance of information provided by the parents.

Changes: Section 300.535(a)(1) is revised to add "parent input" to the variety of sources from which the public agency will, under § 300.535(a)(1), draw in interpreting evaluation data for the purpose of determining if a child is a child with a disability.

Comment: A few commenters were concerned that the note inappropriately implied that it is not necessary to use a team of professionals and more than one assessment procedure to plan and implement the evaluation for a child and to determine eligibility. A few other commenters stated that the note inappropriately states that all sources must be used for all children whose suspected disability is mental retardation. Other commenters requested that the note be revised to state that for some children information from additional sources, such as an assessment of independent living skills, might be needed.

Discussion: Section 300.532 requires that a variety of assessment tools be used, that no single procedure be used as the sole criterion for determining the eligibility or needs of a child with a disability, and that the child be assessed in all areas of suspected disability. Section 300.534 requires that a team of professionals and the parent determine a child's eligibility.

The proposed note did not in any way diminish these requirements. It clarified that, consistent with the statute and these final regulations, the point of § 300.535(a)(1) is to ensure that more than one source is used in interpreting evaluation data and in making these determinations, and that although that subsection includes a list of examples of sources that may be used by a public agency in determining whether a child is a child with a disability, as defined in § 300.7, the agency would not have to use all the sources in every instance. While the proposed note provided clarifying information on the regulatory requirements, in keeping with the general decision to eliminate notes, the note would be removed.

Changes: The note has been removed.

Reevaluation (§ 300.536)

Comment: Some commenters asked for clarification as to what constitutes a reevaluation. A few of these commenters asked whether a determination under § 300.533(a) that no additional data are needed as part of a reevaluation constitutes a reevaluation and whether parent consent under § 300.505(a)(iii) is required under such circumstances.

A few commenters requested clarification as to whether a public agency must provide a reevaluation each time that a parent requests a reevaluation. A few commenters asked that a Note clarify that a public agency must conduct a reevaluation upon parent request, whether or not the public agency agrees that a reevaluation is needed, while others requested clarification that a public agency may refuse a parent request for reevaluation and afford parents the opportunity for a due process hearing to challenge the refusal. A few other commenters asked for clarification as to whether a public agency must conduct an evaluation whenever requested by the parent, regardless of the frequency of such requests.

A few commenters asked that the regulation be revised to require that public agencies consider the need for a reevaluation of a child with a disability at least once every three years, rather than require, as in the NPRM, that a reevaluation be conducted at least once every three years.

Discussion: Under both prior law and the current regulations, if a parent requests a reevaluation, the public agency must either: (1) provide the parents with written notice of the agency's proposal to conduct the reevaluation; or (2) provide the parents with written notice of the agency's refusal to conduct a reevaluation. The parent may challenge such a proposal or refusal by requesting a due process hearing. If the agency conducts a reevaluation and the evaluation group concludes that under § 300.533(a) no additional data are needed to determine whether the child continues to be a child with a disability, the public agency must provide parents with the notice required by § 300.533(c)(1), and must provide such assessment upon parent request.

The statute specifically requires at section 614(a)(2) that "a reevaluation of each child with a disability is conducted ... at least once every three years." However, in meeting this requirement, a group will, pursuant to § 300.533, review existing data and determine what, if any, additional assessment data are needed. Parent consent is not required for a review of existing data; however, parent consent would be required before additional assessments are conducted.

Changes: None.

Comment: A few commenters noted that § 300.536(b) references § 300.530(b), a nonexistent subsection.

Discussion: The noted reference is a typographical error.

Changes: Section 300.536(b) has been revised to refer to § 300.530 rather than § 300.530(b).

Additional Procedures for Evaluating Children With Specific Learning Disability (§§ 300.540—300.543)

Comment: Commenters raised a variety of issues regarding the regulatory provisions concerning the additional procedures for evaluating children suspected of having specific learning disabilities. However, none of those comments raised significant concerns about the minor changes from prior regulations proposed in the NPRM, which were designed merely to accommodate new statutory provisions regarding the participation of parents in evaluation determinations and evaluation reports and documentation of eligibility determinations applicable to all eligibility determinations, including those regarding specific learning disabilities.

Discussion: As indicated in the preamble to the NPRM, the Department is planning to conduct a careful, comprehensive review of research, expert opinion and practical knowledge of evaluating and identifying children with a specific learning disability over the next several years to determine whether changes to the standards and process for identifying children with a specific learning disability should be proposed. Because that review has not been done, no further changes are made to the regulations.

Changes: None.

General LRE Requirements (§ 300.550)

Comment: A number of commenters asked that the regulation be revised to make clear that a child with a disability cannot be removed from the regular class environment based on the type or degree of modifications to the general curriculum that the child needs, or on the types of related services that the child needs. Some commenters asked that paragraph (b)(1) be revised to make clear that whatever the setting selected, the child is educated in the general curriculum. Others asked that paragraph (b)(2) be revised to require consideration of positive behavioral supports in educating children with disabilities in regular classes.

A few commenters asked that a cross-reference to the exceptions in § 300.311(b) and (c) be added for students with disabilities convicted as adults and incarcerated in adult prisons. Several commenters asked that a note be added to specify that ESY services must be provided in the LRE. Another asked that a note explain that the reference to "special classes" in paragraph (b)(2) refers to special classes based on special education needs rather than special classes that the LEA makes available to all children, whether nondisabled or disabled, such as remedial reading, art, or music classes.

Discussion: Placement in the LRE requires an individual decision, based on each child's IEP, and based on the strong presumption of the IDEA that children with disabilities be educated in regular classes with appropriate aids and supports, as reflected in paragraph (b) of this section. The regulations always have required that placement decisions be based on the individual needs of each child with a disability and prohibited categorical decision-making.

In addition, the new statutory provisions regarding IEPs, reflected in the regulations at § 300.347(a)(1) and (2) specify that IEPs must include a statement of how the child's present levels of educational performance affect the child's involvement and progress in the general curriculum and a statement of measurable annual goals, including benchmarks or short-term objectives for meeting the child's disability-related needs to enable the child to be involved in and progress in the general curriculum. These provisions apply regardless of the setting in which the services are provided.

Similarly, the IEP team, in developing the IEP under § 300.346(a)(2)(i), is required to consider positive behavioral intervention, strategies and supports to address the behavior of a child with a disability whose behavior impedes his or her learning or that of others. These provisions are designed to foster the increased participation of children with disabilities in regular education environments or other less restrictive environments, not to serve as a basis for placing children with disabilities in more restrictive settings.

The determination of appropriate placement for a child whose behavior is interfering with the education of others requires careful consideration of whether the child can appropriately function in the regular classroom if provided appropriate behavioral supports, strategies and interventions. If the child can appropriately function in the regular classroom with appropriate behavioral supports, strategies or interventions, placement in a more restrictive environment would be inconsistent with the least restrictive environment provisions of the IDEA. If the child's behavior in the regular classroom, even with the provision of appropriate behavioral supports, strategies or interventions, would significantly impair the learning of others, that placement would not meet his or her needs and would not be appropriate for that child.

The IDEA Amendments of 1997 place renewed emphasis on teaching children with disabilities to the general curriculum and ensuring that these children are included in State- and district-wide assessments of educational achievement. Because, as commenters noted, one consequence of heightened accountability expectations may be unwarranted decisions to remove children with disabilities from regular classrooms so as to avoid accountability for their educational performance, the regulations should make clear that the type or extent of the modifications that the child needs to the general curriculum not be used to inappropriately justify the child's removal from education in regular, age-appropriate classrooms. Therefore, a provision should be added to § 300.552 to provide that a child not be denied education in age-appropriate regular classrooms solely because the child's education required modification to the general curriculum. Under this provision, for example, a child with significant cognitive disabilities could not be removed from education in age-appropriate regular classrooms merely because of the modifications he or she needs to the general curriculum. This provision should not be read to require the placement of a child with a disability in a particular regular classroom or course if more than one regular age-appropriate classroom or course is available in a particular grade or subject.

A cross-reference to the exceptions in § 300.311(b) and (c), like that in § 300.347(d), will make the regulations clearer and more complete.

As the discussion of § 300.309 explains in more detail, while ESY services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ESY services to students with disabilities in integrated settings if the public agency does not provide summer services for its nondisabled children.

While the commenters are correct that the reference to "special classes" in paragraph (b)(2) refers to special classes necessary to meet special education needs, and not classes that an LEA makes available to all children, such as remedial reading, or advanced placement, art or music classes, paragraph (b)(1) provides that the LRE provisions of the regulations are focused on educating children with disabilities with nondisabled children to the maximum extent appropriate. In that context, the reference to "special classes" is to classes organized on the basis of disability and not classes that are based on some other interest, need or ability of the students.

Changes: A cross-reference to the requirements of § 300.311(b) and (c) has been added to paragraph (a).

A new paragraph has been added to § 300.552 prohibiting removal of a child with a disability from an age-appropriate regular classroom solely because of needed modifications in the general curriculum.

Continuum of Alternative Placements (§ 300.551)

Comment: A number of commenters requested that the regulation include a statement that a child does not need to fail in each of the less restrictive options on the continuum before they are placed in a more restrictive continuum placement that is appropriate to their needs. These commenters felt that this was needed to insure that children get appropriate services in a timely manner. Some commenters requested that the regulations specify that the placement appropriate for children who are deaf must be in a setting where the child's unique communication, linguistic, social, academic, emotional, and cultural needs can be met, including opportunities for interaction with nondisabled peers.

Discussion: The regulations do not require that a child has to fail in the less restrictive options on the continuum before that child can be placed in a setting that is appropriate to his or her needs. Section 300.550(b)(2) of the regulations however, does require that the placement team consider whether the child can be educated in less restrictive settings with the use of appropriate supplementary aids and services and make a more restrictive placement only when they conclude that education in the less restrictive setting with appropriate supplementary aids and services cannot be achieved satisfactorily. New statutory changes to the IEP development process make clear that the IEP team considers the language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode in developing IEPs for children who are deaf or hard of hearing. These requirements, which are included in the regulations at § 300.346(a)(2)(iv), should address the concerns raised by the commenters. In light of this change, further regulation is not necessary.

Changes: None.

Comment: A number of commenters expressed concern about the note following this section regarding home instruction. Some stated that the note should be struck because it implied that home instruction was an appropriate placement for all medically fragile children and that this was contrary to the requirement that placement be determined based on the individual needs of each child. Some asked that the regulation limit home instruction to those medically fragile children whose treating physicians have certified are not able to participate in a school setting with other children.

Others disliked the note because they believed that home instruction should be available in other instances when the IEP team determines that such a placement is appropriate and should not be limited by type of disability. Some commenters wanted the note to be revised to make clear that home instruction could be available for children with behavior problems and those in interim alternative educational placements because they had been suspended or expelled from school for disciplinary reasons if the IEP team determined that it was the appropriate placement. Others asked that the note should be revised to caution about the inappropriate use of home instruction as a placement for children suspended and expelled, unless requested by the parent for medical, health protection, or diagnostic evaluation purposes. Some commenters asked that the note make clear that discipline issues should be handled through the provision of appropriate services in placements other than home.

Some commenters asked that the note be modified to state that home instruction services may be appropriate for young children if the IEP/IFSP team determines appropriate. Other commenters asked that the regulations make clear that home instruction services are an appropriate modification of the IEP or placement for incarcerated youth who are being kept in segregation, close custody or mental health units.

Discussion: Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery. The implication in the note that placement decisions could be based on the type of disability of a child was unintended.

Instruction at home may be the most natural environment for a young child with a disability if the child's IEP/IFSP team so determines. 'Home instruction' may be an appropriate modification of an IEP or placement under § 300.311 for incarcerated youth who are being kept in close custody, or segregation or in a mental health unit. The issue of home instruction for children with disabilities who have been suspended or expelled for behavior that is not a manifestation of their disability is addressed under § 300.522.

Changes: The note has been deleted.

Placements (§ 300.552)

Comment: A number of commenters asked that paragraph (a)(1) be revised to require that parents be informed about the full range of placement options, especially for children who are deaf or hard of hearing. Often these commenters also asked that the regulations contain a statement that the appropriate placement of a child who is deaf or hard of hearing is the setting in which the child's unique communication, linguistic, academic, social, emotional and cultural needs can be met.

One commenter asked that the regulations include standards for numerical improvements in the percentages of children with disabilities who are educated in regular classes and dates by which those standards are to be met.

Discussion: The discussion concerning § 300.551 notes that the IEP provisions of the regulations already incorporate statutory language concerning the need to consider the particular needs of children who are deaf or hard of hearing in developing appropriate IEPs.

Since placements are determined based on the needs of individual children, and because the IDEA Amendments of 1997 provide that parents of children with disabilities are members of any group that makes decisions on the education placement of their child (section 614(f) of the Act) it would seem to be unnecessary and unreasonably burdensome to require LEAs to inform parents about the full range of placement options.

Under § 300.501(c), parents must now be included in the group making decisions about the educational placement of their child. In view of the principle of regulating only if necessary, the regulations are not changed in the ways suggested by these commenters.

With respect to paragraph (a)(1) of this section, nothing in the regulations would prohibit a public agency from allowing the group of persons that makes the placement decision to also serve as the child's IEP team, so long as all individuals described in § 300.344 are included. However, in the interest of limiting the use of notes in these regulations, Note 1 would be removed.

Changes: Note 1 has been removed. See discussion of comments received under § 300.550 regarding the addition of a new § 300.552(e) prohibiting removal of a child with a disability from an age-appropriate regular classroom solely because of needed modifications in the general curriculum.

Comment: A number of commenters asked for revisions to the regulation designed to foster the inclusion of children with disabilities in the schools and classrooms they would attend if not disabled, such as explaining that children with disabilities could be placed at another school only with compelling educational justification and not for reasons of administrative convenience, or requiring that the child be educated at the school that they would attend if not disabled unless the child's educational needs require some other placement. Others wanted the regulation to recognize the administrative right to make geographic assignments so that not every facility in a school district would need to be made accessible, as provided under the Section 504 and Americans with Disabilities Act regulations.

Discussion: LEAs are strongly encouraged to place children with disabilities in the schools and classrooms they would attend if not disabled. However, the regulatory provision has always provided that each child with disabilities be educated in the school he or she would attend if not disabled unless their IEP required some other arrangement. (See, § 300.552(c)). Physical accessibility of school facilities is covered more fully by section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA).

Changes: None.

Comment: Some commenters felt that paragraph (d) of the regulation required burdensome, unnecessary paperwork. Others requested its deletion because they felt that too often a district is unwilling to prevent potential harmful effects and uses this provision to make segregated placements that are then presented as being "in the child's best interest." One commenter asked that this paragraph be revised to emphasize how integration of children with disabilities and nondisabled children and successful learning are now necessary conditions of one another.

Discussion: Paragraph (d) of this section does not impose paperwork burdens. Paragraph (d) of this section provides important protections for children with disabilities and helps ensure that they and their teachers have the supports to prevent any harmful effect of a placement on the child or on the quality of services that he or she needs. If the placement team determines that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that child at that time.

Generally, as the commenter suggests, achievement test performance of students in inclusive classes is the equivalent or better than achievement test performance of others in segregated setting and self-concept, social skills and problem solving skills improve for all students in inclusive settings. Placement decisions, however, need to consider the individual needs of each child.

Changes: None.

Comment: A number of commenters were concerned with placement considerations for preschool-aged children with disabilities. Some expressed support for the language in Note 2 regarding preschool children with disabilities. Others thought that the language of the note that indicated that school districts that did not operate regular preschool programs might have to place preschool children with disabilities in private preschool programs as a means of providing services in the LRE should be struck as it was not required by the statute, or would be costly to implement.

Some thought the explanation about LRE for preschool children with disabilities should be in the regulation, as it is important that schools understand that they may meet the requirements of paragraph (c) for preschool children with disabilities by participating in other preschool programs such as Head Start, operated by other agencies, through private agencies serving preschool-aged children, and by locating preschool programs in elementary education schools that serve all children.

One commenter asked that the reference to 'private school programs for nondisabled children' be struck as suggestive that private schools are not bound to comply with the ADA. Some commenters thought that the note implied that a full continuum is not needed for preschool children with disabilities and should be revised. Another commenter stated that locating classes of preschool children with disabilities in regular elementary schools is not an appropriate solution to meeting the LRE for preschoolers and should be struck from the note.

Discussion: Language has been added to the regulation to clarify that the requirements of § 300.552, as well as the other requirements of §§ 300.550-300.556, apply to all preschool children with disabilities who are entitled to receive FAPE. Note 2 to this section in the NPRM was intended to provide suggestions on how a public agency may meet the LRE requirements if it does not generally provide education to nondisabled preschool children. However, in light of the general decision to remove all notes from these final regulations, the note would be removed.

Public agencies that do not operate programs for nondisabled preschool children are not required to initiate those programs solely to satisfy the requirements regarding placement in the LRE. For those public agencies, the note provided some alternative methods for meeting the LRE requirements. The examples in the note of placing preschool children with disabilities in private preschool programs and locating classes for preschool children with disabilities in regular elementary schools as a means of meeting the LRE requirements were not intended to limit the placements options on the continuum which may be used to meet the LRE needs of preschool children. The full continuum of alternative placements at 34 CFR 300.551, including integrated placement options, such as community-based settings with typically developing age peers, must be available to preschool children with disabilities.

The overriding rule in this section is that placement decisions for all children with disabilities, including preschool children, must be made on an individual basis. The reference in the note to "private school programs for nondisabled children" was not intended to suggest that private schools are not required to comply with the ADA.

The second part of Note 2 to proposed § 300.552 cited language from the 1976 published analysis of comments on the regulations implementing Section 504 of the Rehabilitation Act of 1973. The issues raised by that analysis (appropriate placement for a child with disabilities whose behavior in a regular classroom significantly impairs the education of other students, and placement of a child with disabilities as close to home as possible) are addressed elsewhere in this attachment.

Changes: A reference to preschool children with disabilities has been added to the introductory paragraph of § 300.552. Note 2 has been removed.

Comment: Several commenters requested adding language that would prohibit States from using a funding mechanism to provide financial incentives to place children with disabilities in a particular type of placement and to specify that State funding mechanisms must be "placement neutral'.

A number of commenters asked that the regulations explicitly include a presumption that placement of children with disabilities is in the regular class, and that the placement team must consider the use of positive behavioral interventions, and supplementary aids and services before concluding that placement in a regular class is not appropriate for a child with a disability. Others asked that the substance of Note 3 (explaining that if behavioral interventions are incorporated into the IEP many otherwise disruptive children will be able to participate in regular classrooms) be incorporated into the regulations. Others felt that Note 3 added steps and services that exceeded the statute.

Discussion: Section 300.130(b) incorporates into the regulations the new statutory provision that specifies that if a State has a funding mechanism that distributes State funds on the basis of the type of setting in which a child is served, that mechanism may not result in placements that violate the LRE requirements, and if the State does not have policies and procedures to ensure compliance with that obligation, it provides the Secretary with an assurance that it will revise the funding mechanism as soon as feasible. Given that requirement, no further change is necessary here.

A presumption of placement in a regular class is already embodied in § 300.550. Note 3 to this section in the proposed regulations merely stated the reasonable conclusion that if behavioral interventions are incorporated into the IEPs of children with disabilities, many of these children, who without those services might be disruptive, can be successfully educated in regular classrooms. Note 3 added no requirements or services that exceed the statute, as the requirement to consider positive behavioral interventions, strategies, and supports to address the behavior of children with disabilities whose behavior impedes his or her learning or that of others, which is contained in § 300.346(a)(2)(i), is taken directly from section 614(d)(3)(B)(i) of the Act. Nevertheless, in the interest of eliminating the use of notes in these regulations, Note 3 should be removed, as it was merely an observation, based on the requirements of the regulations.

Changes: Note 3 has been removed.

Nonacademic Settings (§ 300.553)

Comment: None.

Discussion: The note following this section in the NPRM pointed out that this provision is related to the requirement in the regulations for section 504 of the Rehabilitation Act of 1973, and emphasized the importance of providing nonacademic services in as integrated a setting as possible, especially for children whose educational needs necessitate their being solely with other disabled children during most of the day. Even children with disabilities in residential programs are to be provided opportunities for participation with other children to the maximum extent appropriate to their needs. However, in light of the decision to remove all notes from these final regulations, the note following this section would be removed.

Changes: The note following this section has been removed.

Children in Public or Private Institutions (§ 300.554)

Comment: One commenter thought that the language of this section was ambiguous and left confusion as to whether special arrangements with public and private institutions were required whether they were needed or not. Another commenter proposed changes that would require arrangements such as a memorandum of understanding with all public and private institutions. One commenter thought that the note following this section conflicted with other regulations concerning incarcerated students and that those students should be excluded from the subject of the note. Another commenter asked that the substance of the note be incorporated into the regulation and that timelines for compliance be included.

Discussion: This section was not intended to require memoranda of agreement or other special procedures that are not necessary to effectively implement § 300.550. Requiring agreements to be developed that are not necessary for meeting the other LRE requirements would be overly prescriptive.

The requirement that disabled students be educated with nondisabled students does apply to students with disabilities who are in correctional facilities, to the extent that the requirement can be met consistent with the terms of their incarceration, except to the extent modified under the authority in § 300.311. One way the LRE requirements could be met for students with disabilities in prisons would be to include them in the educational activities of nondisabled prisoners and provide appropriate services in that environment. If a State has transferred authority for the education of students with disabilities who are convicted as adults under State law and incarcerated in adult prisons to another agency, the other agency, not the SEA, would have to ensure that LRE requirements are met as to that class of students.

The note following this section in the NPRM reflected the important fact that, except as provided in § 300.600(d) (regarding students with disabilities in adult correctional facilities), children with disabilities in public and private institutions are covered by the requirements of these regulations, and that the SEA has an obligation to ensure that each applicable agency and institution in the State meets these requirements. Whatever the reasons for the child's institutional placement, if he or she is capable of education in a regular class, the child may not be denied access to education in a regular class, consistent with § 300.550(b). Timelines for development of memoranda of agreement or other special implementation procedures would be overly prescriptive. In light of the decision to remove notes from these final regulations, the note would be removed.

Changes: Section 300.554 has been reworded to clarify that special arrangements with public and private institutions are only required if needed to ensure that § 300.550 is effectively implemented. A technical change has been made to the regulation to make clear that the SEA's responsibility does not include students with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The note following this section has been removed and a new paragraph has been added to § 300.300(a) to more generally make the point that services and placement decisions must be based on a child's individual needs and not category of disability.

Technical Assistance and Training Activities (§ 300.555)

Comment: Some commenters asked that parents and advocates be included in the training mentioned in paragraph (b) of this section. Another commenter asked that the regulation make clear that education support personnel as well as teachers and administrators are fully informed and provided technical assistance and training necessary to help them meet their LRE responsibilities. Another commenter wanted SEAs to provide specific training and information on LRE for children who are deaf and hard of hearing.

Discussion: As a matter of good practice, SEAs and LEAs are encouraged to develop opportunities for school personnel (including related service providers, bus drivers, cafeteria workers, etc.) and parents to learn together about all of the requirements under the Act because these experiences will improve cooperation among school personnel and between schools and parents and lead to improved services for children with disabilities. However, regulation on this point is not appropriate, as SEAs need the flexibility to respond to particular circumstances in their jurisdictions. For the same reason, additional specificity about the school personnel who need information and training or the subject matter of that training is not appropriate.

Changes: None.

Monitoring Activities (§ 300.556)

Comment: One commenter asked that States be required to establish criteria that would trigger monitoring reviews of LEA placement procedures to ensure compliance with LRE requirements because of the long history of violations of these provisions. Another asked that the regulations specify that SEAs must initiate enforcement actions, if appropriate.

Discussion: SEAs, under their general supervisory responsibility, are charged with ensuring that the requirements of the Act are met. That responsibility includes monitoring LEA performance, providing technical assistance and information on best practices, and requiring corrective action and instituting enforcement actions when necessary. The provisions of this section reinforce the active role SEAs need to play in implementing the entire Act and emphasize the importance of the LRE requirements in meeting the goals of the Act. The role of SEAs in implementing the requirements of the Act will be carefully reviewed by OSEP in its monitoring of States.

Changes: None.

Access Rights (§ 300.562)

Comment: A number of commenters were concerned about the types of records to which parents have access under this section. For example, some believed that the regulations should make clear that parents would not have access to copyrighted materials such as test protocols, or private notes of an evaluator or teacher. Others took the opposite view, urging that whenever raw data or notes are used to make a determination about a student, that information should be subject to parent access. Commenters also requested clarity on the question of the schools' liability for allowing parents access to records under these regulations when other laws or contractual agreements prohibit such disclosure.

One commenter asked that the right be phrased as the right "to inspect and review all records relating to their children" rather than to "all education records relating to their children."

Discussion: Part B incorporates and cross-references the Family Educational Rights and Privacy Act (FERPA). Under Part B, the term "education records" means the type of records covered by FERPA as implemented by regulations in 34 CFR part 99. Under § 99.3 (of the FERPA regulations), the term "education records" is broadly defined to mean those records that are related to a student and are maintained by an educational agency or institution. (FERPA applies to all educational agencies and institutions to which funds have been made available under any program administered by the Secretary of Education.)

Records that are not directly related to a student and maintained by an agency or institution are not "education records" under FERPA and parents do not have a right to inspect and review such records. For example, a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be a part of his or her "education records." However, Part B and FERPA provide that an educational agency or institution shall respond to reasonable requests for explanations and interpretations of education records. (34 CFR 300.562(b)(1); 34 CFR 99.10(c)).

Accordingly, if a school were to maintain a copy of a student's test answer sheet (an "education record"), the parent would have a right under Part B and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other adequate manner that would inform the parent.

With regard to parents having access to "raw data or notes," FERPA exempts from the definition of education records under 34 CFR 99.3 those records considered to be "sole possession records." FERPA's sole possession exception is strictly construed to mean "memory-jogger" type information. For example, a memory-jogger is information that a school official may use as a reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals.

With respect to the issue of liability for disclosing information to parents when other laws or contractual obligations would prohibit it, public agencies are required to comply with the provisions of IDEA and FERPA, and must ensure that State law and other contractual obligations do not interfere with compliance with IDEA and FERPA. Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.

There is nothing in the legislative history of section 615(b)(1) of the Act to suggest that it expanded the scope of information available to parent examination beyond those records that they would have access to under FERPA.

Changes: None.

Comment: There were a variety of comments regarding the timeline in paragraph (a) for agency compliance with a parent request to inspect and review records. Some commenters thought it should be "45 school days" rather than 45 calendar days. Others felt that 45 days was too long, and that access should be provided usually within 10 days and no longer than 30 days after the request. Others wanted a one business day timeline if the agency has initiated an expedited due process hearing. Another commenter asked that agencies have to respond to a request to inspect and review before any meeting that parents now have the right to attend, not just before IEP meetings and due process hearings. Other commenters wanted access to be required at least five days before an IEP meeting and wanted it made clear that if State or local law provided for shorter timelines, that those timelines must be met.

Discussion: The 45 day timeline is taken from FERPA, to which these regulations are tied by statute. FERPA requires that each educational agency or institution establish appropriate procedures for the granting of a request by parents for access to the educational records of their children within a reasonable period of time but in no case more than 45 days after the request has been made. In order not to confuse and increase administrative burden, these regulations are intended to be consistent with FERPA where possible. In practice, schools often provide access within a period of time that is considerably shorter than the 45-day time limit, which is the maximum time allowed for compliance.

The commenters are correct that the new expedited due process hearing procedures will require prompt access by parents when requested, but the regulations already adequately addresses the obligation of the participating agencies to provide access before a hearing and so no more specific timeline is added to the regulations. However, the regulations should be changed to acknowledge the new expedited due process hearing procedures in §§ 300.521–300.528 concerning discipline. Changes are not made with respect to other meetings, in light of the confusion and increased administrative burden inherent in such a change. Public agencies, however, are encouraged to provide parents access, when requested, in advance of these meetings to the greatest extent possible.

Changes: Paragraph (a) of this section has been amended to acknowledge that access rights also apply to the new expedited due process hearing procedures under §§ 300.521–300.528.

Comment: Other commenters asked that parents receive at no cost copies of their child's records prior to meetings or hearings, rather than just have the right to inspect and review those records. Another commenter asked that the regulations specify that parents or their legal representatives have the right to copy any record they feel they need for an agency-specified reasonable charge per page. Another commenter stated that parents or their legal representatives should also have access to any manuals used in preparing or evaluating any student records.

Discussion: As explained previously, these regulations should be consistent with those implementing FERPA to the greatest extent possible to prevent confusion and limit administrative burden on participating agencies. Therefore, it would not be appropriate to give parents additional rights to copies of their child's records. FERPA generally provides for a right to inspect and review records (34 CFR § 99.10) and permits agencies to charge fees for copies of education records provided to parents. (34 CFR 99.11).

These rules would apply to education records of a student that concern services required under the IDEA as well as all other education records. Paragraph (b)(2) of § 300.562 provides that a participating agency is required to provide copies of education records to a parent if failure to do so would effectively prevent the parent from inspecting and reviewing the records. (See, also 34 CFR 99.10(d)(1)). One such instance would be if the parent lives outside commuting distance of the participating agency. The Secretary has decided that it would impose unnecessary burden to require participating agencies to provide copies except as described previously. However, participating agencies are free to adopt policies of providing copies in other cases, if they choose to do so.

Access should not be required to documents that are not covered by the definition of education records, such as teacher or evaluator manuals. The requirements of paragraph (b)(1) of this section and 34 CFR 99.10(c) which provide that parents may request an explanation and interpretation of their children's education records will permit parents sufficient information about the contents of their children's education records.

Changes: None.

Fees (§ 300.566)

Comment: Several commenters requested that this section make clear that fees that can be charged may not include the cost of the labor involved in copying the records. Others asked that participating agencies not be permitted to charge parents more than the actual costs they incur in copying the records, or charge more than the prevailing rate in the community. Commenters also asked that agencies not be permitted to require parents to provide private financial information before providing copies of records at no cost. Some commenters asked whether LEAs could use Part B funds to cover the costs of providing parents copies so that fees would not have to be charged.

Discussion: Under these regulations and those implementing FERPA, participating agencies are entitled to charge reasonable fees for the actual cost of reproduction and postage. Under FERPA, a school may charge a fee for a copy of an education record which is made for the parent, unless the imposition of a fee effectively prevents the parent from exercising the right to inspect and review the student's education records. A school may not charge a fee to search for or to retrieve the education records. (34 CFR 99.11). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so. Agencies may use Part B funds to cover the costs that otherwise would be charged to parents.

Changes: None.

Consent (§ 300.571)

Comment: One commenter noted an apparent contradiction between this section, which requires parental consent before records are disclosed, and proposed § 300.529(b), which requires that LEAs transmit copies of special education and disciplinary records of a child to appropriate authorities when reporting a crime to those authorities.

Discussion: As explained in the discussion of §§ 300.529 and 300.529(b) permit the transmission of copies of education records only to the extent that disclosure without parental consent is permitted by FERPA. Because the prior § 300.571 would have prohibited disclosures without parent consent to agencies, such as law enforcement or juvenile justice agencies, that are not "participating agencies" under §§ 300.560–300.577 even though disclosure without parent consent to these entities in certain circumstances would have been permitted under FERPA, a change should be made to this section so that these regulations permit disclosures to the extent they are permitted under FERPA.

Changes: Paragraph (a) has been amended to permit disclosures without parental consent to the agencies identified in § 300.529, to the extent permitted under FERPA.

Destruction of Information (§ 300.573)

Comment: One commenter suggested that destruction of student records could act to deny students future benefits such as private insurance coverage and assistance in college.

Discussion: The regulations provides that parents must be informed when personally-identifiable information is no longer needed to provide educational services to the child. This notice would normally be given after a child graduates or otherwise leaves the agency. As the note following this section in the NPRM pointed out, personally-identifiable information on a child may be retained permanently unless a parent requests that it be destroyed.

The purpose of the destruction option is to allow parents to decide that records about a child's performance, abilities, and behavior, which may possibly be stigmatizing and are highly personal, are not maintained after they are no longer needed for educational purposes. On the one hand, parents may want to request destruction of records as it is the best protection against improper and unauthorized disclosure of what may be sensitive personal information. However, individuals with disabilities may find that they need information in their education records for other purposes, such as public and private insurance coverage.

In informing parents about their rights under this section, it would be helpful if the agency reminds them that the records may be needed by the child or the parents for social security benefits or other purposes. Even if the parents request that the information be destroyed, the agency may retain the information described in paragraph (b) of this section.

In instances in which an agency intends to destroy personally-identifiable information that is no longer needed to provide educational services to the child (such as after the child has graduated from, or otherwise leaves the agency's program), and informs parents of that determination, the parents may want to exercise their right to access to those records and request copies of the records they will need to acquire post-school benefits in the future. In the interest of limiting the use of notes in these regulations, the note following this section would be removed.

Changes: The note following this section has been removed.

Children's Rights (§ 300.574)

Comment: Several commenters asked that the substance of the notes following this section in the NPRM be incorporated in the regulations.

Discussion: Because of the importance of clarifying the relationship of parent and child rights under IDEA and FERPA, including the new provisions of the IDEA concerning transfer of rights at the age of majority, and the general decision to eliminate all notes in these regulations, the substance of the notes following this section in the NPRM would be incorporated into the regulations.

Changes: The substance of Notes 1 and 2 have been incorporated into the regulations.

Disciplinary Information (§ 300.576)

Comment: One commenter requested that the term "disciplinary action" be defined. A commenter asked that the regulations make clear that action taken in response to conduct that was a manifestation of the child's disability is not "disciplinary action" under this section. Another asked that the results of a manifestation review be included in the student records to protect the child as well as the educational agencies.

One commenter asked that this section be revised to clarify that before applying a policy and practice of transmitting disciplinary information in the student records of disabled children, an LEA must first have such a policy and practice for the student records of nondisabled students, and that transmissions of student records that include disciplinary information to a student's new school under paragraph (c) can only occur to the extent such information is transferred for nondisabled students.

Discussion: It is important that the regulations allow school districts to understand what information may be transmitted under this section. Under Section 504, schools may not take a disciplinary action that constitutes a change of placement for behavior that was a manifestation of a child's disability. Making this point in the context of these regulations will assist schools in understanding what information may not be considered a statement about a disciplinary action and protect the interests of children with disabilities in not being identified as disciplinary problems because of behavior that is a manifestation of their disability. Further regulations are not necessary about what information may be transmitted to another school to which the child transfers.

Further regulation is not needed to make clear that the LEA's policy on transmitting disciplinary information must apply to both nondisabled and disabled students, as that provision is already contained in paragraph (a) of this section as to an LEA's policy. An LEA that had a policy that applied equally to nondisabled and disabled students but applied that policy only to transfers of records of disabled students would be in violation of Section 504, as well as Part B.

Changes: None.

Department Procedures (§§ 300.580–300.589)

Comment: One commenter objected that the procedures in proposed §§ 300.580–300.589 are overly detailed and bureaucratic. This commenter also stated that these procedures incorporate language from the old regulations concerning disapproval of State plans, which is no longer relevant in light of changes in the statute. Another commenter noted that proposed § 300.583 mentioned disapproval of State plans and requested that it be revised to refer to denial of eligibility.

Discussion: The Department does not agree that the procedures in §§ 300.580–300.589 are overly detailed. When the Secretary proposes to deny a State's eligibility, withhold funds or take other enforcement action and when a State has requested a waiver of supplement not supplant or maintenance of effort requirements, it is important to all parties that the process through which those issues will be decided is clearly described, so that time, money and effort are not spent resolving procedural questions instead of the underlying issues. The commenter is correct that proposed §§ 300.580–300.586 are substantially the same as old regulations that addressed disapproval of a State plan, and that State plans are no longer required by the statute. When necessary, however, these same procedures were designated in the past by the Secretary as the procedures to follow on a proposed denial of State eligibility, a concept that remains in the law.

Changes: A technical change has been made to § 300.583(a)(1) to refer to denial of State eligibility rather than State plan disapproval.

Enforcement (§ 300.587)

Comment: Some commenters stated that the regulations should contain a trigger when the Department must initiate enforcement action for systematic noncompliance with the Act. These commenters wanted a similar trigger provision added to § 300.197 regarding SEA enforcement against noncompliant LEAs. One commenter asked that paragraph (c) be revised to specify that fund withholding first be limited to funding for administrative personnel of the noncompliant SEA or LEA, so as to prevent denial or interruption in services to children with disabilities. Another commenter requested that the enforcement mechanisms mentioned in the note be incorporated into the regulation.

Several commenters objected to language in paragraph (e) which indicated that the Secretary would have a variety of enforcement actions available if a State were not providing FAPE to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The commenters expressed the belief that the statute and its legislative history make clear that the only enforcement action for failure to provide services to individuals convicted as adults under State law and incarcerated in adult prisons when the State has assigned responsibility for ensuring compliance with the IDEA to an agency other than the SEA under section 612(a)(11)(C) of the Act would be to withhold that agency's pro-rata share of the Part B grant.

Discussion: It would not be advisable to limit, through regulation, the discretion afforded the Secretary by the statute regarding appropriate enforcement mechanisms and when they should be employed. Given the very wide variety in potential situations in which compliance issues arise, and the significant differences in the scope and nature of the issues presented in compliance situations, the Secretary needs the discretion to exercise reasoned judgment about how best to achieve compliance and the tools to be used to do so.

Under the statute, the Secretary, upon a finding of a State's noncompliance with the provisions of Part B or of an LEA's or State agency's noncompliance with any condition of their eligibility, shall withhold further payments, in whole or in part, or refer the matter for appropriate enforcement action, which may include referral to the Department of Justice. This statutory language provides clear authority for including in the regulations the three enforcement options of withholding, referral to the Department of Justice, and other enforcement actions authorized by law. The other enforcement actions authorized by law include those set out in the General Education Provisions Act (GEPA), which are generally applicable to recipients of funds from the Department and are consistent with the goal of ensuring compliance with the requirements of this program.

The enforcement mechanisms mentioned in the note to this section are authorized by GEPA. The purpose of the note is merely to inform the readers that these are some of the additional enforcement procedures that the Secretary could choose to apply to a given instance of noncompliance. In the interest of limiting the use of notes in the regulations, the note would be deleted.

In cases where the State has transferred to a public agency other than the SEA the responsibility for ensuring compliance with the Act as to children with disabilities who are convicted as adults under State law and are incarcerated in adult prisons, and the Secretary finds substantial noncompliance by that other public agency, the statutory language limits withholding a proportionate share of the State's total grant under section 611 of the Act. However, the statute does not impose restrictions on the Department's use of other enforcement mechanisms. The legislative history on this issue shows two primary concerns, one is the reasonable limitation of services to this population in order to allow States to balance bona fide security and compelling penological concerns against the special education needs of the individual, and the other is that a State not be threatened with a withholding of their entire grant amount for a failure to serve this population.

The regulations address these concerns by interpreting the statutory provisions in a way that limits withholding of funds as Congress intended, but allows the Secretary, should he or she believe that limited withholding of funds is not the appropriate means to ensure compliance, the additional enforcement options authorized by law.

Changes: The note following this section has been deleted.

Waiver of Requirement Regarding supplementing and not Supplanting With Part B Funds (§ 300.589)

Comment: One commenter said that because State requests for waivers of provisions of the Act are major policy proposals, the public participation requirements of §§ 300.280–300.284 should apply to the State's waiver request proposal. The commenter also asked that § 300.589 be revised to permit public comment to be considered on any impact the waiver request will have on the State's ability to successfully implement the Act, not just the FAPE provisions of the Act.

Discussion: The procedures proposed by the Secretary provide for public comment on the question of whether a waiver should be granted by the Secretary after the State has first made a prima facie showing that FAPE is and will continue to be available if the waiver is granted. (See § 300.589(d)). This process is adequate to ensure that the views of the public are considered in deciding waiver requests and §§ 300.280–300.284 should not be applied to the State's waiver request proposal.

Sections 612(a)(18)(C) and 612(a)(19)(C)(ii) of the Act give the Secretary the authority to grant a waiver in whole or in part if the State provides "clear and convincing evidence that all children with disabilities have available to them a free appropriate public education." Under § 300.589(d), when the Secretary conducts a public hearing on a State's waiver request, interested parties are afforded the opportunity to present evidence on whether FAPE is currently available to all children with disabilities and whether the State will be able to ensure that FAPE remains available to all eligible children with disabilities if the Secretary provides a waiver. This would include a wide variety of topics, such as the State's ability to ensure an adequate supply of qualified personnel to provide FAPE, or to maintain an effective and efficient due process hearing system. Even if a waiver is granted, the State will still be required to comply with all the other requirements of Part B.

Changes: A technical change has been made to conform to the statutory provision that the Secretary provides a waiver in whole or in part.

Subpart F

Responsibility for all Educational Programs (§ 300.600)

Comment: Several commenters requested that this section be revised to emphasize the SEA's obligation to monitor implementation of the Act. One commenter requested that States be required to verify that all corrective actions have been taken within a certain period of time. Another commenter asked that paragraph (d) be revised to specify that the SEA retains supervisory authority over any public agency to which the Governor or his or her designee has assigned responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

Discussion: A strong SEA monitoring process to ensure effective implementation of the Act is crucial to improving educational results for children with disabilities. A basic component of eligibility has long been that the SEA exercises general supervisory responsibility over all educational programs for children with disabilities in the State, including ensuring that those programs meet the requirements of Part B. This responsibility includes not just monitoring, and enforcement when noncompliance is not corrected, but also effective technical assistance that focuses on best practice designed to improve the substantive content and results of special education. We know, from long experience in administering this Act, that if SEA monitoring is lax, noncompliant practices emerge at the local level and indicators of performance for children with disabilities decline.

A priority of the Department's monitoring will be the State's compliance regarding the State's supervisory role in the implementation of Part B. However, further regulation is not necessary. There is a great variety of circumstances that may give rise to compliance problems, and States should have some flexibility in fashioning remedies and timelines for correction. Verifying that corrective action has been completed has always been an integral part of the State's supervisory role.

The statute permits the Governor or appropriate State designee to assign to another agency supervisory responsibility for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. The statute does not contemplate that the SEA would retain supervisory authority over the education of children with disabilities who are convicted as adults under State law and incarcerated in adult prisons if the Governor or designee has assigned that responsibility to another agency.

Changes: Consistent with the decision to not include notes in these regulations, the note following this section has been removed.

Amount Required for Subgrants to LEAs (§ 300.623)

Comment: None.

Discussion: The amount that will be required to be distributed as subgrants to LEAs for capacity-building and improvement activities as specified in § 300.622 will vary from year to year and is determined by the size of the increase in the State's allocation. Funds used for the required subgrants to LEAs in one year become part of the required amount that must be flow-through to LEAs consistent with the formula in § 300.712 in the next year.

In those years in which the State's allocation does not increase over the prior year by at least the rate of inflation, the required set-aside for capacity-building and improvement grants will be zero. However, States may always use, at their discretion, funds reserved for State-level activities under § 300.602 for these subgrants.

Changes: Consistent with the decision to not include notes in these regulations, the note following this section has been removed.

State Discretion in Awarding Subgrants (§ 300.624)

Comment: None.

Discussion: This section specifies that States may establish priorities for subgrants under § 300.622 to LEAs and may award those subgrants competitively or on a targeted basis. This is because the purpose of subgrants under § 300.622, as distinguished from the formula subgrants to LEAs under § 300.712, is to provide funding that the SEA can direct to address particular needs not readily addressed through formula assistance to school districts such as funding for services to children who have been suspended or expelled. The SEA can also direct these funds to promote innovation, capacity building, and systemic changes that are needed to improve educational results.

Changes: Consistent with the decision to not include notes in these regulations, the note following this section has been removed.

Establishment of Advisory Panels (§ 300.650)

Comment: One commenter wanted the regulation revised to specify that the panel must be independent and operate under the direction of officers elected by members of the panel.

Discussion: Additional specificity is not needed. Within the limits of the minimum requirements of the regulations, the operation of these panels should be left to the States.

The concept from the note, that the State advisory panel would advise on the education of children with disabilities who have been convicted as adults and incarcerated in adult prisons, even if a State has assigned general supervision responsibility for those students to an agency other than the SEA should be incorporated into § 300.652, which addresses the functions of the State advisory panel. This is consistent with the purpose of the advisory panel under section 612(a)(21)(A) of the Act—to provide policy guidance with respect to special education and related services for children with disabilities in the State.

Changes: The second sentence of the note has been integrated into § 300.652. The note has been removed.

Membership (§ 300.651)

Comment: The Department received a variety of comments concerning the membership of the State advisory panels. Many commenters wanted representatives of specific additional groups, such as a representative of a Parent Training and Information Center in the State, added to the list of mandatory membership. Several commenters wanted paragraph (b) to be modified to permit parents of adults who had been children with disabilities, or persons who had relatively recent experience (e.g., within the last three years) as a parent of a child receiving services under the Act, to be counted as a part of the mandatory majority.

Some commenters wanted a provision added to paragraph (b) to prohibit individuals with a past or present affiliation, such as employment, with an agency receiving funding under the Act from being considered a part of the individuals with disabilities, or parents of children with disabilities, majority. Others asked that the regulations encourage States to seek the participation of nonacademic professionals on the panels or to recruit parent representatives through nominations from parent and advocacy groups.

Discussion: An advisory panel will be most effective if it fairly represents the various interests of the groups concerned with the education of children with disabilities and is perceived as such by the community at large. In selecting members for the State advisory panel, States are encouraged to solicit individuals to serve as members who do not have, and will not be perceived as having, a conflict of interest in representing the views of the group they were selected to represent. That said, additional regulation is not necessary or appropriate. The requirements of § 300.651 are statutory. States should have the discretion to appoint members to these panels, within these statutory requirements, in a manner that best meets their needs. There is nothing in the Act that prohibits an individual with a disability, or the parent of a child with a disability, from employment with the SEA or an LEA, and there will be many instances when the perspective that an individual with a disability or the parent of a child with a disability may bring to decisions as an employee of a public education agency will greatly improve education for children with disabilities in that jurisdiction. The term "children with disabilities" is a defined term under the Act and in the context of Part B, refers to those children with disabilities from birth through age 21 who are eligible for services under Part B.

Changes: None.

Advisory Panel Functions (§ 300.652)

Comment: Several commenters sought expansion of the duties of the advisory panel to encompass various operational tasks, such as overseeing the development and implementation of a reliable and timely data system on due process hearings.

Discussion: Section 612(a)(21)(A) of the Act specifies that the purpose of the State advisory panels is to provide policy guidance with respect to special education and related services for children with disabilities in the State. The functions of the advisory panel specified in § 300.652 are drawn from the statutory charge of the advisory panels. The regulations do not mandate operational duties for an advisory panel. However, if the SEA wants to assign other responsibilities to the advisory panel, it may do so, as long as those other duties do not prevent it from carrying out its responsibilities under IDEA.

Changes: No change has been made in response to these comments. See discussion of comments received under § 300.650, regarding a change to § 300.652.

Advisory Panel Procedures (§ 300.653)

Comment: Some commenters asked that paragraph (d) be revised to require that public notice of advisory panel meetings and agendas be made far enough in advance so that interested parties, such as parents and others, may plan to attend. At least one commenter requested that the term "reasonable and necessary expenses" in paragraph (f) be revised to indicate that child care expenses are reimbursable.

Discussion: Since the purpose of announcing meetings and agendas for those meetings is to allow the interested public to attend, the meetings and agendas of the meetings of the advisory panels should be announced early enough so that interested parties can plan to attend those meetings, but an absolute time line is not necessary. A similar standard is used in these regulations at § 300.281(c)(2) regarding notice of public hearings about State policies and procedures related to the Part B program. Furthermore, States should have the discretion to decide what are reasonable and necessary expenses related to participation in meetings and performing other duties of the advisory panel. These may include child care expenses or personal assistant services.

Changes: Paragraph (d) is revised to require that advisory panel meetings and agenda items are announced enough in advance to afford interested parties a reasonable opportunity to attend and that the meetings be open to the public.

Adoption of State Complaint Procedures (§ 300.660)

Comment: Several commenters requested that the note following this section be deleted, while others thought it was important to make the point that compensatory services can be awarded by an SEA.

Discussion: The note merely reflected what has always been the case—that SEAs have the authority to order compensatory services in appropriate circumstances as a remedy for violations of Part B in resolving complaints under the procedures in §§ 300.660–300.662. However, in light of the decision to remove all notes from these regulations, and to emphasize the importance of SEA action to resolve complaints in a way that provides individual relief when appropriate and addresses systemically the provision of appropriate services, a provision would be added to this section to clarify that if it has found a failure to provide appropriate services to a child with a disability through a complaint, the resolution addresses both how to remediate the denial of services, which can include an award of compensatory services, monetary reimbursement, or other corrective action appropriate to the needs of the child, and how to provide appropriate services for children with disabilities.

Changes: A new paragraph (b) has been added on how an SEA remedies a denial of appropriate services. The prior paragraph (b) has been integrated into paragraph (a) and the reference to parent training and information centers is corrected. The note has been deleted.

Minimum State Complaint Procedures (§ 300.661)

Comment: A number of commenters requested that the possibility of Secretarial review be reinstated in the final regulations while others supported the change. Some State commenters objected to having to resolve complaints on matters on which parents could have elected to file a due process hearing request.

Discussion: The possibility of Secretarial review has not been an efficient use of the Department's resources, which can be better directed to improving State system-wide implementation of the Act for the benefit of students with disabilities. Because of the unsuitability of the Department evaluating factual disputes in individual cases, most requests for Secretarial review are denied. The existence of the Secretarial review process may falsely encourage parents to delay taking an issue to mediation or due process so that their case is not timely filed. The Department has other more efficient mechanisms such as on-site monitoring reviews, policy reviews and complaint referrals, to ensure correction of violations that are brought to its attention. In addition, the Department intends to carefully assess States' efforts to improve their complaint resolution processes where the need is identified.

State responsibility for ensuring compliance with the Act includes resolving complaints even if they raise issues that could have been the subject of a due process hearing request. A State's general supervisory responsibility is not satisfied by relying on private enforcement efforts through due process actions for all issues that could be the subject of a due process hearing. In addition, the State complaint process and mediation provide parents and school districts with mechanisms that allow them to resolve differences without resort to more costly and litigious resolution through due process.

In the interests of building cooperative, collaborative relationships with all parties involved in the education of children with disabilities, States are encouraged to offer mediation, as appropriate, when a State complaint has been filed, as well as when a due process hearing has been requested. The existence of ongoing mediation in and of itself should not be viewed as an exceptional circumstance under § 300.661(b); however, if the parties agree that the complaint resolution timeline should be extended because of the mediation the SEA may extent the timeline for resolution of the complaint.

In light of the general decision to remove all notes from these regulations, the notes following this section would be removed. Because these notes provided an important explanation of how the State complaint process interacts with the due process hearing process, they would be incorporated into the regulation. This will reduce unnecessary disputes between SEAs and complainants in cases in which a complaint raises an issue that also is raised in a due process hearing.

Changes: Paragraphs (b) and (c) have been combined into a new paragraph (b). A new paragraph (c) has been added to clarify that if an issue in a complaint is the subject of a due process hearing, that issue (but not those outside of the due process proceeding) would be set aside until the conclusion of the due process hearing; that the decision of an issue in a due process hearing would be binding in a State complaint resolution; and that a public agency's failure to implement a due process decision would have to be resolved by an SEA. The notes following this section have been deleted.

Filing a Complaint (§ 300.662)

Comment: Commenters generally supported the concept, reflected in paragraph (c) of this section, that there should be a reasonable time limit on issues subject to the complaint process. One commenter wanted a delayed effective date for this limitation until the individual notice of these complaint procedures had been in effect for a year. Another wanted States to be able to waive that limitation for compelling reasons. Another commenter wanted States to have more flexibility to disregard complaints that are weak or insubstantial, are a continuation of a pattern of complaints that have repeatedly been found factually or legally unfounded, or that are about the same issue as addressed in a recently closed complaint or compliance review. Another commenter objected to the note, stating that a State should not have to deal with complaints filed by persons outside the State.

Discussion: The time limits in § 300.662(c) were added in recognition that at some point the issues in a complaint become so stale that they are not reasonably susceptible to subsequent resolution. However, such a time limit should include an exception for continuing violations. States are free to accept and resolve complaints regarding alleged violations that occurred outside those timelines, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the Act and its implementing regulations.

States must evaluate and resolve each complaint on its own merits. It is reasonable for a State to resolve a complaint on an issue that is the same as an issue in an earlier resolved complaint by reference to that earlier complaint resolution if it has first concluded, through review and evaluation, that the facts and circumstances pertinent to the complaints are unchanged. If a State were to refuse to accept a complaint because it appeared to be similar to an issue in an earlier-resolved complaint without reviewing whether the facts and circumstances pertinent to the complaints remain the same, the State could be ignoring potential violations of the Act.

With regard to the statement in the note that States must resolve complaints which allege violations of the Act within their respective State even if received from an individual or organization outside of the State, States are responsible for ensuring compliance with Part B.

A complaint about implementation of the Act filed by someone outside of the State may be as effective in bringing compliance issues to the State's attention as complaints from State residents. In light of the general decision to remove all notes from these regulations, and to make clear the point that complaints from organizations or individuals from out of State must also be resolved, that concept would be integrated into § 300.660(a).

Changes: Section § 300.660(a) has been revised to clarify that any complaint includes complaints filed by organizations or individuals from another State. The note following this section has been deleted.

Subpart C—Allocation of Funds; Reports

Allocations to States (§ 300.703)

Comment: None.

Discussion: A reference to allocating funds to the freely associated States was omitted from paragraph (a).

Paragraph (a) incorrectly refers to the method of distribution in §§ 300.704–300.705. These sections are reserved.

Changes: A reference to freely associated States has been added and the references to §§ 300.704–300.705 have been deleted.

Permanent Formula (§ 300.706)

Comment: None.

Discussion: Paragraph (b)(2) refers to the amount received by a State under "this section" in the base year. Funds would not be provided under this section of the regulations in the base year. They would be provided under section 611 of the Act, as indicated in § 300.703(b).

Changes: The reference has been corrected to cite section 611 of the Act.

Increases in Funds (§ 300.707)

Comment: None.

Discussion: Section 300.707 indicates how allocations are to be made if the amount available for allocations to States under § 300.706 is equal to or greater than the amount allocated to the States under "this section" for the preceding fiscal year. The reference to "this section" should be to section 611 of the Act.

Changes: The reference has been revised by replacing the words "this section" the first time they appear with "under section 611 of the Act".

Limitation (§ 300.708)

Comment: None.

Discussion: The language in § 300.708 describing conditions that are "Notwithstanding § 300.707" are actually consistent with § 300.707 since § 300.708 is mentioned in § 300.707 as establishing conditions.

Changes: The reference has been clarified by rewording the first sentence of § 300.707.

Allocations to LEAs (§ 300.712)

Comment: Commenters were concerned about the distribution of funds when the permanent formula takes effect. In particular, with regard to the base payments provision in § 300.712(b), commenters expressed concern that it could result in a reduction of funds for LEAs in the case of an SEA that distributes more than 75 percent of its allocation to LEAs, and the LEA has a high child count. Because of the apparent absence of a "hold harmless" provision, commenters recommended clarification that this provision does not require an SEA to reduce its allocation to an LEA. Other commenters asked whether proposed § 300.712(b)(2)(i) means that States should be allocating extra funds to LEAs based on the total number of students, both regular and special education students, or whether States should allocate based on numbers of special education students only. These commenters requested that the phrase "relative numbers" be clarified.

With respect to the note following this section of the NPRM, a concern of one commenter was that proposed § 300.712(b)(2) could be construed as limiting States' ability to direct how their LEAs expend Part B funds that have been reallocated to LEAs that had not adequately provided FAPE to children with disabilities, and recommended clarification that a State may direct how any allocation to an LEA is to be spent.

A commenter recommended that, in calculating the distribution of the 15 percent allocation under the permanent formula, consideration be given for LEAs with a high incidence of children who live in institutional and other congregate care facilities, who have special needs and attend public schools.

Discussion: Section 611(g)(2)(B)(i) of the Act requires that when the permanent formula becomes effective, LEAs be allocated base payments based on 75 percent of the amounts that each State received in the year prior to that in which the permanent formula became effective. Funds that States are required to allocate to LEAs above this level must be allocated based on children enrolled in elementary and secondary schools and children in poverty. This will result in some redistribution of funds among LEAs that have received funds above the 75 percent level on a basis of counts of children with disabilities. However, because these provisions are based on the Act, they cannot be changed through regulations. States may address this redistribution of resources through funds that they set aside for State level activities.

The IDEA Amendments of 1997 maintain, in section 611(f) of the Act, as reflected in § 300.370(a), the flexibility of States to provide additional support to LEAs using these funds. However, it is appropriate to amend § 300.370 to clarify that SEAs may use these funds directly, or distribute them on a competitive, targeted, or formula basis to LEAs.

Section 300.712(b)(2)(i) is based on section 611(g)(2)(B)(ii)(I) of the Act, which requires that required flow through funds to LEAs be distributed based on the relative numbers of "children enrolled" in public and private elementary and secondary schools. Children enrolled include both regular and special education students. The term "relative numbers", which is used in section 611(g)(2)(B)(ii) of the Act and in proposed § 300.712(b)(2), adequately conveys the meaning that the allocations of the 85 percent and the 15 percent will be the same proportion of the total available as the respective numbers of children in the LEA to the State totals.

Section 300.712(b)(3) deals with the allocation of funds, not the use of funds.

Section 611(g)(2)(B)(ii) of the Act, as reflected in proposed § 300.712(b)(2), requires that 15 percent of the funds remaining after base payments be distributed based on the relative numbers of children living in poverty as determined by the SEA in each LEA. The incidence of children living in institutional or other congregate care facilities is not a factor in this distribution, and cannot be added. However, SEAs may use funds available for State level activities to provide additional support for children in institutional or other congregate care facilities.

Changes: Section 300.370 has been amended to add a new paragraph (c) to clarify that an SEA may directly use funds that it retains but does not use for administration, or may distribute them to LEAs on a competitive, targeted, or formula basis.

Comment: None.

Discussion: Although no comments were received for this Part regarding base payments for new LEAs, a number of commenters on the Preschool Grants for Children with Disabilities program regulations (34 CFR Part 301) raised the issue of whether charter schools or LEAs not in existence during fiscal year 1997 would be eligible for a base payment under § 301.31(a) of the regulations for the Preschool Grants for Children with Disabilities program, and, if so, how such payments should be calculated.

A similar issue exists with regard to base payments under the Assistance to States for the Education of Children with Disabilities program after the appropriation under section 611(j) of the Act exceeds $4,924,672,200. The regulations should be revised to ensure that charter schools established under State law as LEAs and LEAs not in existence in the year prior to the year in which the appropriation for the Assistance to States for the Education of Children with Disabilities program exceeds $4,924,672,200 are eligible to receive base payments.

In addition, if the boundaries of LEAs that were in existence or administrative responsibility for providing services to children with disabilities ages 3 through 21 are changed, adjustments to the base payments of the affected LEAs also should be made. For example, a change in administrative responsibility might encompass a change in the age range for which an LEA is responsible for providing services such as where responsibility for serving high school students is transferred from one LEA to another.

These adjustments will ensure that affected LEAs equitably share in their base payments. The base amounts for new and previously existing LEAs, once recalculated, should become the new base payments for the LEAs. These base payments would not change unless the payments subsequently need to be recalculated pursuant to § 300.712.

Adjustments to base payments would be based on the current numbers of children with disabilities served as determined by the SEA. In making a determination, the SEA may exercise substantial flexibility. For example the SEA may choose to revise base payments based on the current location of children with disabilities included in a previous child count or a new count of children served by affected LEAs.

Changes: Section 300.712 has been revised to clarify that, if LEAs are created, combined, or otherwise reconfigured subsequent to the base year (i.e. the year prior to the year in which the appropriation under section 611(j) of the Act exceeds $4,924,672,200), the State is required to provide the LEAs involved with revised base allocations calculated on the basis of the relative numbers of children with disabilities ages 3 through 21, or 6 through 21 depending on whether the State serves all children with disabilities ages 3 through 5, currently provided special education by each of the affected LEAs.

Comment: A number of commenters requested that notes be deleted from the regulations implementing Part B of IDEA.

Discussion: The note following this section in the NPRM indicates that States should use the best data available to them in making allocations based on school enrollment and children living in poverty. The note also encourages LEAs to include data on children who are enrolled in private schools and suggests alternative sources such as aggregate data on children participating in the free or reduced-price meals program under the National School Lunch Act and allocations under title I of the Elementary and Secondary Education Act as bases for determining poverty. These suggestions still reflect options for allocating funds, but need not be specified in the regulations. The requirement for States to use the best data available to them should be included in the regulations.

Changes: The note has been removed and § 300.712 has been expanded to state that for the purpose of making grants under this section, States must apply, on a uniform basis across all LEAs, the best data that are available to them on the numbers of children enrolled in public and private elementary and secondary schools and the numbers of children living in poverty.

Former Chapter 1 State Agencies (§ 300.713)

Comment: Commenters indicated that § 300.713, which mirrors the statutory language regarding payments to former Chapter 1 State agencies, should be clarified to indicate that these agencies must receive the current amount of their Part B allocation, rather than an amount that would not exceed the fiscal year 1994 per child amount. Otherwise, the result would be a reduction of allocations to these agencies. The commenters recommended adding a new paragraph (c) to § 300.713 to provide that, in years where the per child amount under Part B exceeds the per child amount for fiscal year 1994, each State agency shall receive the per child amount under Part B for each child to whom the agency is providing special education and related services in accordance with an IEP.

Other commenters indicated the need to clarify that payments to former Chapter 1 State agencies are targeted for direct service costs as in the past. Several commenters believe that payments to former Chapter 1 State agencies must follow the child, and recommended inserting the phrase "including State-operated and State-supported school programs" after 1994 at the conclusion of § 300.713(a) to ensure that the children who are counted actually receive the funds for which they are eligible.

Some commenters stated that the merger of the former Chapter 1 Handicapped program with Part B had a negative effect at the State level on private special education schools, because funds intended for children are now being used by many States for both State and municipal administrative costs. Other commenters recommended, consistent with the intent of the merger of the former Chapter 1 Handicapped program with Part B, that these schools should be treated as LEAs for funding purposes, regardless of whether they meet the Part B definition of LEA.

One commenter took issue with the fact that the Act specifies a reporting date of December 1 of the fiscal year, while the proposed regulation allows a State, at its discretion, to report on December 1 or on the last Friday of October. Since the Act sets a specific date, this commenter requests that only the statutory date be used in the regulation.

Discussion: Funds provided to former Chapter 1 State agencies that exceed fiscal year 1994 levels are provided either because the amounts to which former Chapter 1 State agencies are entitled as LEAs, without regard to their status as former Chapter 1 agencies, exceed the minimum allocations for former Chapter 1 agencies, or at the discretion of the States from funds available to be set aside for State level activities.

The IDEA Amendments of 1997 maintain, in section 611(f), as reflected in § 300.370(a), the flexibility of States to provide additional support to State agencies beyond the formula entitlement of LEAs under § 300.712. It would be inappropriate, as well as inconsistent with the Act, to compel States that have voluntarily passed through higher levels of funding to State agencies in the past to maintain those levels of funding as a requirement.

There has been confusion in some States regarding the entitlement of former Chapter 1 Handicapped State agencies to funds distributed by formula to LEAs that would be above the amounts these State agencies received per child for 1994 under the Chapter 1 Handicapped program. Under the IDEA, both before and after enactment of the IDEA Amendments of 1997, the amounts to which these State agencies are entitled are minimum amounts. Former Chapter 1 Handicapped State agencies are entitled to formula allocations in the same amounts as other LEAs. They may also be eligible for additional payments to bring their funding levels per child up to the levels they received under the Chapter 1 Handicapped program for fiscal year 1994.

Under the initial allocation of fiscal year 1998 funds, which became available on July 1, 1998, the minimum per child allocations that former Chapter 1 Handicapped State agencies are entitled to as LEAs exceeds the amount per child that these agencies received for fiscal year 1994 under the Chapter 1 Handicapped program in 40 States. SEAs in these States must provide former Chapter 1 Handicapped State agencies at least the minimum amount per child that they are entitled to as LEAs, not the lesser amounts that they received per child under the Chapter 1 Handicapped program for 1994.

For 10 States and the District of Columbia, the minimum per child amounts to which former Chapter 1 Handicapped State agencies are entitled as LEAs are still slightly smaller than the amounts that these agencies received per child for 1994 under the Chapter 1 Handicapped program. In these States, SEAs must provide the former Chapter 1 Handicapped State agencies with the amounts per child that these agencies are entitled to as LEAs. SEAs must then provide additional funds to the former Chapter 1 Handicapped State agencies from the amounts that the SEAs set aside for State level activities. The amount of these additional funds is equal to the difference between the amount per child that the former Chapter 1 State agencies received under the Chapter 1 Handicapped program for 1994 and the amount per child they receive as LEAs, multiplied by the lesser of the number of children ages 6 through 21 currently served by the former Chapter 1 Handicapped State agencies or the number of children ages 3 through 21 served by these agencies for 1994 under the Chapter 1 Handicapped program.

It is expected that for the Federal fiscal year 1999 appropriation, which will become available on July 1, 1999, the minimum per child amounts that will be provided to all LEAs, including former Chapter 1 Handicapped State agencies, will exceed the per child allocations under the Chapter 1 Handicapped program in all States.

Former Chapter 1 agencies are subject to the same requirements as other LEAs, and are not limited to using Part B funds only for direct service costs.

Adding the phrase "including State-operated and State-supported school programs" after "1994" at the conclusion of § 300.713(a) would not ensure that the children who are counted actually receive funds. Moreover, the last paragraph in § 300.713(a) deals with the optional use of funds available for State level activities to increase funding for LEAs that formerly served children who had at one time been in State-operated or State-supported programs, not to increase funding for State-operated and State-supported programs themselves. However, States, at their discretion, may use funds available for State level activities to provide support for State-operated or State-supported programs under § 300.370.

It should also be noted that, under the Act, States are required to ensure that all children with disabilities have access to a free appropriate public education regardless of the sources of funds that are used to provide that education. Ensuring that specific amounts of Federal funds are used for each of the 6 million children with disabilities who receive special education services would be administratively unwieldy and would not necessarily help to ensure that States meet this requirement.

The Chapter 1 Handicapped program was merged with the IDEA Part B Assistance to States for the Education of Children with Disabilities program in 1995. The merger was not affected by the IDEA Amendments of 1997, and its impact cannot be addressed by these regulations.

Section 602(15) of the Act defines LEA as including educational service agencies. Educational service agencies are defined in section 602(4) of the Act and § 300.10 as including public institutions or agencies having administrative control and direction over a public elementary or secondary school. State agencies formerly provided funding under the Chapter 1 Handicapped program and which continue to provide special education and related services to children with disabilities fall within this definition. Individual schools that received funding through State agencies under the Chapter 1 Handicapped program are not LEAs under the Part B Assistance to States for the Education of Children with Disabilities program.

Section 611(d)(2) of the Act specifies that, for the purpose of allocating funds among States, States may report children either as of December 1 or the last Friday in October of the fiscal year for which funds are appropriated. Using the same dates for establishing minimum funding levels for former Chapter 1 Handicapped State agencies will reduce burden on States that count children in October by eliminating the need for a separate count of children served by State agencies in December.

Changes: Language has been revised in paragraph (a)(1) to clarify that the amount that each former Chapter 1 State agency must receive is a minimum amount.

Reallocation of LEA Funds (§ 300.714)

Comment: One commenter recommended that this section be eliminated because it causes a disincentive for LEAs to provide "adequate" or even more than "adequate" FAPE.

Another commenter stated that the regulation must provide the State agency with a basis for determining that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, and indicated that there is a need for guidance on criteria for determining when any portion of the funds allocated under this part may be removed. Criteria suggested by the commenter for this purpose include: (1) IEP related measures such as appropriateness of measurable IEP goals and a high percentage of annual goals successfully completed; (2) educational inputs such as student staff ratios including related services staff; and (3) a relatively large amount of unexpended IDEA funds.

Discussion: The authority of SEAs to reallocate funds among LEAs if they determine that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by the LEA and that the LEA does not need those funds to provide FAPE, is included in section 611(g)(4) of the Act. This authority cannot be removed through regulations. However, it is expected that SEAs would use this authority only in unusual circumstances (e.g., when there is a radical reduction in the number of children served by a LEA).

Moreover, the instances in which an SEA would reallocate the funds of an LEA because the LEA is providing adequate services and does not need the funds should be relatively rare, and the circumstances causing such a determination also should be unusual.

It would be very difficult to establish criteria that could be appropriately and fairly applied in all cases. For this reason, the criteria for determining these instances should be left at the discretion of the States.

Changes: None.

Payments to the Secretary of the Interior for the Education of Indian Children (§ 300.715)

Comment: None.

Discussion: The reference to "this section" in paragraph (a) should also include a reference to § 300.716 because the earmarked funds include Indian children covered under both sections.

Changes: The term "this section" in § 300.715(a) has been revised to read "this section and § 300.716."

Limitation for Freely Associated States (§ 300.719)

Comment: None.

Discussion: The references to "this part" in paragraph (c) of this section should be changed to "Part B of the Act."

Changes: Section 300.719 (c)has been amended, consistent with the above discussion.

Annual Report of Children Served—Report Requirement (§ 300.750)

Comment: Several commenters objected to the note following § 300.750 of the NPRM, stating that it reflects only the requirements of prior law, and not all requirements in the current section 611 of the Act. The commenters recommended that, if the note is retained, it needs to be revised to conform more closely to the current language used in the Act. For example, the references in the note to section 611(a)(5) of the Act should be deleted, since that section no longer exists. Also, the population that a State may count for allocation purposes no longer differs from the population of children to whom the State must make FAPE available, and this needs to be explained in the note.

Another commenter recommended that the regulations on annual SEA reports to the Department be amended to include the requirements of section 618(a)(1)(A) of the Act.

Discussion: The note following this section in the NPRM indicates that the number of children who are counted for the purpose of distributing funds may be different from the children for whom the States must make FAPE available. In order to receive full funding under Part B of the IDEA, States must provide services to all children with disabilities ages 3 through 17, and to children 18 through 21 when not inconsistent with State law or practice, or the order of any court. These statements in the note reflect the requirements of IDEA. However, consistent with the decision to not include notes in the final regulations, the note should be deleted.

It should be noted that until the appropriation for the Assistance to States for the Education of Children with Disabilities program exceeds $4,924,672,200, the interim formula requires that funds be distributed based on the number of children served, and the limitations in section 611(a)(5) of IDEA prior to the IDEA Amendments of 1997, which prohibit the Secretary from counting more than 12 percent of children with disabilities in certain cases, will be in effect until that time.

The content of the report is addressed in § 300.751. The reporting requirements in section 618 of the Act are complex. The Secretary believes that it would be better to address the data reporting requirements of the new section 618 as part of the clearance process for data collection rather than through these regulations.

Changes: The note has been removed.

Annual Report (§ 300.751)

Comment: Commenters stated that while § 300.751(a) specifies the information that must be included in the report for any year before the total appropriation for section 611 of the Act first exceeds $4,924,672,200, it is unclear what information should be included in the report after that date. The commenters indicated a need for this clarification in the regulation.

Other commenters recommended that the regulation clarify that if a child is deaf-blind, that child must be reported under that category, and if the child has more than one disability (other than deaf-blindness), that child must be reported under multiple disabilities. These commenters also requested that the regulations explain that the responsibility for the annual census count of deaf-blind children should be with the single and multi-State deaf-blind projects.

Discussion: Before the total appropriation for section 611 of the Act first exceeds $4,924,672,200, a count of children ages 3 through 21 will be used for distributing funds. After this level is reached, data on the number of children served will continue to be necessary due to the requirement in section 611(a)(2) of the Act that no State be allocated an amount per disabled child served greater than 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States. The language in § 300.751 should reflect this requirement. In addition, data included in the report does not necessarily reflect the flexibility potentially available to the States to use sampling to collect data or new data reporting requirements for children ages 3 through 9.

The NPRM provided that a child with deaf-blindness must be reported under the category "deaf-blindness" and that a child who has more than one disability, other than deaf-blindness, must be reported under the category "multiple disabilities".

The single and multi-State deaf-blind projects, which are funded under discretionary awards under Part D of the Act, are not responsible for conducting a census count of deaf-blind children. Those projects were required to report on the number of children with deaf-blindness that they serve. These Part

300 regulations set out the requirements for participation of States under Part B of the Act.

Changes: This section has been reworded to reflect in paragraph (a) data required for the distribution of funds, including data on the numbers of children with disabilities that are provided special education and related services in the age groupings 3 through 5, 6 through 17, and 18 through 21. The remainder of the section has been revised to reflect the Secretary's ability to permit sampling to collect data, new data collection requirements in the Act, and to clarify that children who are not classified as developmentally delayed and who have two disabilities consisting of deafness and blindness should be reported under the category of "deaf-blind".

Annual Report of Children Served—Certification (§ 300.752)

Comment: None.

Discussion: The certification of an accurate and unduplicated count of children with disabilities receiving special education and related services on the dates in question is critical only with regard to obtaining information needed for the allocation of funds.

Changes: The certification of an accurate and unduplicated count has been limited to the data required under § 300.751(a), which, as revised, is limited to information required to make funding allocations to States.

Annual Report of Children Served—Criteria for Counting Children (§ 300.753)

Comment: None.

Discussion: Children with disabilities who are enrolled by their parents in private schools should be able to be counted by LEAs if those children receive special education or related services, or both, that are provided in accordance with a services plan and meet the requirements of §§ 300.452–300.462. The language in the NPRM could have been read to require that children with disabilities enrolled by their parents in private schools be provided all of the related services they need to assist them in benefitting from special education in order for the LEAs to count these children.

Changes: Section 300.753 has been revised to permit LEAs to count private school children with disabilities who are receiving special education or related services, or both, that meet standards and are provided in accordance with §§ 300.452–300.462.

Comment: A number of commenters requested that notes be deleted from the regulations implementing Part B of IDEA.

Discussion: Note 1 following this section in the NPRM indicated that States may count children with disabilities in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards. All children who are counted must be enrolled in a school or program providing special education or related services that is operated or supported by a public agency. However, a child with a disability may also be enrolled in a private school. All children who are counted must be provided with services that meet State standards regardless of whether they are also enrolled in a private school.

Note 2 to this section in the NPRM indicated that where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education, the child may be counted. The revised § 300.753 more clearly reflects the fact that children with disabilities enrolled by their parents in private schools are eligible to be counted. This is true whether the curriculum of the school consists of basic or regular education, or special education.

Note 2 also indicated that the Department expects that there would only be limited situations in which special education would be clearly separated from regular education—generally, if speech services are the only special education required by the child. This expectation is not consistent with the flexibility that LEAs have in providing services to children in private schools.

As Note 2 indicated, a State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If an SEA or LEA is responsible for serving these children, and does provide them special education and related services, they may be counted.

If a public agency places or refers a child with disabilities to a public or private school for educational purposes, parents may not be charged for any part of the child's education.

Changes: The notes have been removed, and language has been added to § 300.753 to clarify that, in order for a State to count children, the children must be enrolled in a school or program that is operated or supported by a public agency, and that they may not count children who are served solely through Federal programs, including programs of the Departments of Interior, Defense, and Education except as covered under § 300.184(c)(2).

Annual Report of Children Served—Other Responsibilities of the State Education Agency (§ 300.754)

Comment: One commenter recommended that the SEA should be required to sanction LEAs for providing intentionally misleading or false information about the number of children with disabilities receiving special education and related services within the LEA's jurisdiction.

Discussion: The IDEA Part B Assistance to States for the Education of Children with Disabilities program is administered primarily through SEAs. It is in the individual State's interest as well as the national interest to ensure that counts of children are accurate; requiring sanctions for LEAs that provide intentionally misleading or false information would be unnecessary and overly prescriptive. The IDEA allows States to impose sanctions subject to the requirements of the Act.

Changes: None.

Comment: None.

Discussion: Section 300.754(d) refers to "reports" under §§ 300.750–300.753. These sections refer to only one report.

Changes: The word "reports" has been changed to "report".

Comment: A number of commenters requested that notes be deleted from the regulations implementing Part B of IDEA.

Discussion: The note following this section in the NPRM indicates that data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form, and that States are encouraged to collect these data in non-personally identifiable form. The formats used by the Secretary for collecting data do not provide for individual identification of children. The formats for data collection by States are a matter of State discretion.

Changes: The note has been removed.

Disproportionality (§ 300.755)

Comment: Commenters recommended that the regulation define what constitutes a significant disproportionality based on race in the identification, labeling, and placement of children with disabilities, thus triggering the obligation to review and revise, as appropriate, identification and placement policies, practices and procedures. Another commenter recommended additional language requiring consultation with parent training and information centers, parent and civil rights advocacy groups, and others, during this process. Other commenters suggested that data be collected annually when the child count is submitted, and that a requirement should be added that data be analyzed. If disproportionality is found, a corrective action plan must be developed by the SEA, and such a plan should be reported to the Secretary and to the public annually.

Another commenter was supportive of the requirement in § 300.755 but noted that, because many BIA schools are serving American Indian children from wide catchment areas, an increasing number of children with disabilities are enrolling in these schools for what may be valid reasons. The commenter recommended a requirement for review and revision of policies by representatives of the Department of the Interior who have experience in the unique political, cultural, and geographical issues affecting the identification of these children as disabled and in need of special education and related services.

Discussion: The Act provides that the States and the Secretary of the Interior must collect data, determine if disproportionality exists, and take corrective action. In order for States and the Department of the Interior to determine if disproportionality exist they must establish criteria for determining what constitutes significant disproportionality. It is expected that the determination of disproportionality will involve consideration of a wide range of variables peculiar to each State including income, education, health, cultural, and other demographic characteristics in addition to race. Prescribing how the States should determine disproportionality and take corrective action would not reflect the varied circumstances existing in each State and is not consistent with discretion afforded to States under the statute.

It should also be noted that the Department's Office for Civil Rights also looks at disproportionality in its review of State and local activities, and that the Office of Special Education Programs will monitor to ensure compliance with this requirement.

The determination of disproportionality is separate from a determination as to whether any corrective action is appropriate. The Secretary of the Interior is expected to utilize knowledgeable individuals to determine if corrective action is called for in a particular instance.

Changes: None.

Part C

The following is an analysis of the significant issues raised by the public comments received on the NPRM published on October 22, 1997 (62 FR 55026) for the Early Intervention Program for Infants and Toddlers with Disabilities. The Department solicited comments on proposed changes to six regulatory provisions in the Early Intervention Program for Infants and Toddlers with Disabilities, formerly known as Part H of the Individuals with Disabilities Education Act (IDEA). Effective July 1, 1998, Part H of IDEA (Part H) was relocated to Part C of IDEA (Part C). The proposed changes were made to conform Part C to proposed changes in Part B of IDEA. On April 14, 1998, the Department published technical changes to the Part C regulations to incorporate statutory changes to Part C made by the IDEA Amendments of 1997 (63 FR 18290). A notice requesting advice and recommendations on Part C regulatory issues was also published on April 14, 1998 (63 FR 18297). Although the deadline for comments on Part C regulatory issues was July 31, 1998, the Department reopened the comment period by publishing another notice on August 14, 1998 (63 FR 43865–43866).

In response to the Department's invitation in the NPRM published on October 22, 1997, several parties submitted comments on the proposed regulations. An analysis of the comments and of the resulting changes in the regulations follow. Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—" and suggested changes the Department is not legally authorized to make under the applicable statutory authority "—are not addressed. All Part C provisions amended by these regulations that were not the subject of the NPRM are amended only to conform provisions to statutory changes to Part C made by the IDEA Amendments of 1997, or to conform technical provisions to changes made to the Part B regulations.

Goals 2000: Educate America Act

Comment: One commenter asked how the Goals 2000: Educate America Act (Goals 2000) would be implemented for infants and toddlers with disabilities, in particular how the first goal of all children in America starting school ready to learn would be realized for infants and toddlers with disabilities. The commenter asked if there would be definitions or criteria promulgated pursuant to Goals 2000 regarding an infant's or toddler's readiness to learn.

Discussion: The National Education Goals are goals, not requirements; no definitions or criteria are necessary to specify how States should make progress towards goal one, "All children in America will start school ready to learn." Children with developmental delays are likely to experience poor educational results because of a disability without appropriate early intervention. By addressing the effects of a disability or complications that could arise if services are not provided, these children will have a greater likelihood of better results, and require less intensive or possibly no special services, when they are ready to enter school. The Part C Early Intervention Program helps States to address the needs of infants and toddlers with disabilities and their families by promoting child find activities, implementing family-focused service systems, coordinating early intervention services on a statewide basis, and providing critical services that otherwise would not be available. As such, the program plays a major role in improving the school readiness of these young children and meeting the National Education Goal of ensuring that every child enters school ready to learn.

Changes: None.

General Comments

Comment: Several of the commenters requested that the Department issue a full notice of proposed rulemaking (NPRM) for the Part C program. Commenters questioned why the particular regulatory provisions in the October 22, 1997 NPRM were singled out for revision. Many requested generally that the Department clarify the statutory amendments to Part C, such as the provisions regarding natural environments.

Discussion: The six provisions related to Part C in these regulations have been revised in order to achieve consistency with parallel Part B regulations. Regarding the remainder of the Part C regulations, the Department solicited comments regarding all of the Part C regulations on April 14, 1998, and extended the comment period on August 14, 1988. Comments received in response to the October 22, 1997 NPRM regarding Part C regulations that were not the subject of that NPRM will be retained and considered with the comments received pursuant to the April 14 and August 14, 1998, solicitations. However, additional submissions from those same commenters are welcome.

These final regulations contain several technical changes that were not included in the April 14, 1998 regulatory changes. All of these changes will be included in the next version of Part C regulations published in the Code of Federal Regulations (CFR), which is revised each year.

As with the final Part B regulations published in this issue of the **Federal Register**, these final Part C regulations will not contain notes. The critical substantive portions of the notes will be incorporated into the corresponding regulatory provision or the applicable discussion section in this preamble. Other information from the notes will be deleted.

Changes: None.

Definition of Parent (§ 303.18)

Comment: There were a few comments regarding the revisions to the definition of parent at § 303.18. Some commenters liked the changes and some objected to the changes. Commenters who objected did so primarily because the proposed changes were perceived to conflict with prior OSEP opinions and ultimately result in fewer children having "parent" representation at meetings. Commenters also asked what constitutes a "long-term parent relationship" for an infant or toddler.

Discussion: The changes to the definition of parent under Part C are to clarify that the definition is an inclusive one and to conform Part C to Part B for consistency and continuity purposes. The changes should result in more, rather than fewer, children having parental representation, as the regulation clarifies that foster parents may, in appropriate circumstances, unless prohibited by State law, serve as parents. Under these regulations, the term "parent" is defined to include persons acting in the place of a parent, such as a grandparent or stepparent with whom the child lives, as well as persons who are legally responsible for a child's welfare; and, at the discretion of the State, a foster parent who meets the requirements in paragraph (b) of this section.

With respect to the meaning of "long-term parental relationship," this term was included to ensure that when a child is in foster care, decisions regarding services are made by the foster parents only if they have had, or will have, a parental relationship that is on-going rather than temporary. The goal is that decisions regarding services will be made only by those who have or will have a substantive understanding of the child's needs. Thus, for example, a parental relationship would be considered "long-term" if (1) at the time the relationship is created, it is intended to be a long-term arrangement, or (2) the relationship has existed for a relatively long period of time. For older children, States could require a more lengthy time period than would be appropriate for infants and toddlers.

Several changes to this provision are in response to comments regarding the corresponding provision in the Part B regulations (§ 300.20). The general definition of "parent" is amended to make clear that adoptive parents have the same status as natural parents. In addition, to avoid conflict with State statutes, a provision is added permitting the use of foster parents under these regulations unless State law prohibits foster parents from acting as parents for these purposes. For further explanation of the changes, see the discussion regarding 34 CFR 300.20 in the preamble to the final Part B regulations.

Changes: Section 303.18 has been amended to specifically include adoptive parents, and to permit States in certain circumstances to use foster parents as parents under the Act without amending relevant State statutes on the definition of "parent". The substance of the note has been incorporated into the regulations, and the note has been deleted.

Prior Notice (§ 303.403)

Discussion: No comments were received regarding proposed § 303.403(b)(4), and it is included in these final regulations. However, given the comments regarding the parallel section under Part B, and the fact that Part C does not have a separate procedural safeguards notice, § 303.403(b)(3) is changed to make clear that the notice given under this section must contain all procedural safeguards under Part C, including the new mediation procedures in § 303.419.

Changes: Section 303.403(b)(3) is amended to clarify that the notice must inform parents about all procedural safeguards available under §§ 303.401–303.460.

Adopting Complaint Procedures (§ 303.510)

Comment: One commenter requested that the Department clarify how frequently States are required to disseminate their State complaint procedures in proposed § 303.510(b); the commenter also asked that the requirement include provisions for limited-English speakers and non-readers.

Discussion: It is unnecessary to specify a frequency for dissemination of State complaint procedures; States have the responsibility to ensure that their publicly-disseminated State complaint materials are distributed to parents, as well as to the other required entities, and to ensure that the materials are kept up to date. In addition, the lead agency is now required to provide an explanation of the State complaint procedures to parents at the various times specified in § 303.403(b)(4), as part of the "prior notice" requirement. The requirements of § 303.403 regarding prior notice include communicating the notice in the parents' native language or other mode of communication; therefore, it is unnecessary to add those provisions to § 303.510.

Because a new paragraph (b) is added to this section (see discussion below), the language in proposed (b) from the NPRM is moved to paragraph (a)(2) of this section.

Changes: A portion of the existing note is incorporated into § 303.510(a) and the note is removed. Proposed Note 2 is incorporated into the regulation as new § 303.510(b); the language in proposed § 303.510(b) is moved to new § 303.510(a)(2). In addition, the language in the proposed note following § 303.511 regarding complaints from out of State is incorporated into § 303.510(a)(1).

Comment: Several commenters requested clarification of the provision regarding compensatory services in Note 2 to proposed § 303.510. Compensatory services are also referenced in proposed § 303.511(c). One commenter stated that compensatory services are not appropriate for infants and toddlers receiving services under Part C; services are already year-round, and because the frequency and intensity of services are individually tailored to the child's needs in the IFSP, supplementing those services would not be appropriate. This commenter noted, however, that families who procure services at their own expense because an IFSP was not implemented in a timely manner should be able to receive reimbursement. Another commenter stated that additional public discussion is needed before finalizing this provision regarding compensatory services. The commenter raised questions concerning how compensatory services would be funded and provided by a lead agency before a child turns three years old, how such services would be funded and provided after the child turns three, and how such post-Part C services would be integrated with the child's special education services. Another commenter requested the Department's "vision" for the proposed application of this regulation.

Discussion: The note reflected what has always been the case "—that lead agencies have the authority to order remedies in appropriate circumstances for a violation of Part C in resolving complaints under the procedures in §§ 303.510–303.512. However, consistent with the decision to remove notes from the Part B regulations, and to emphasize the importance of lead agency action to resolve complaints in a way that provides individual relief when appropriate and addresses systemically the provision of appropriate services, a provision is added to this section. The provision clarifies that if the lead agency has found a failure to provide appropriate services to an infant or toddler with a disability through a complaint, the resolution must address both how to remediate the denial of services, and how to provide appropriate services for all infants and toddlers with disabilities in the State and in the future. While recognizing that compensatory services, in the sense used under Part B, may be inappropriate for an infant or toddler in many instances, it should not be precluded where it is an appropriate corrective action as determined by the lead agency based on the individual circumstances. Lead agencies retain the authority, responsibility, and flexibility to construct appropriate remedies in individual cases in order to obtain the results needed for the child and family. Possible remedies may include reimbursement of sums spent by a parent, services—compensatory or otherwise, or other appropriate corrective action.

Regarding the issue of a complaint filed after a child turns three and is no longer eligible for Part C services, if parents have a complaint about the services received or not received by their child while an infant or toddler, those parents would properly file the complaint with the lead agency that had responsibility for the child during that time period, even if the child has "aged out" of the Part C program at age three. That lead agency has the responsibility to resolve and, as appropriate, investigate the complaint, and award appropriate corrective action, which may need to be designed by working with the SEA if the child is Part B-eligible, or by working with other appropriate service providers if the child is not Part B-eligible. These regulations do not prevent parents from filing a complaint with the lead agency after the child leaves the Part C program. In addition, if the alleged violation is systemic, corrective action would be required in order to ensure that a violation does not continue for other infants and toddlers. However, to prevent undue burden on lead agencies from very old cases, § 303.511(b) contains time limitations on complaints.

Changes: A new paragraph (b) has been added to § 303.510 to address how a lead agency remedies a denial of appropriate services, in place of proposed Note 2. Proposed paragraph (b) has been moved to new § 303.510(a)(2).

Filing a Complaint (§ 303.511)

Comment: Two commenters objected to the one-year time limit for filing a complaint in proposed § 303.511(c). They stated that parents are often not knowledgeable about their rights at their first entrance into a complex system, and that violations may not be apparent until after the child exits the system. The commenters stated that the one-year limit may also conflict with existing State laws governing administrative proceedings. These commenters also questioned when it would be appropriate for an organization to file a complaint, and asked why the proposed note states that lead agencies must resolve complaints filed by entities from another State.

Discussion: The time limits in proposed § 303.511(c) were added in recognition that at some point the issues in a complaint are no longer reasonably susceptible to resolution. However, such a time limit should include an exception for continuing violations; this would include a violation for a specific child, e.g., one that began when an infant was 4 months old and still continues at age two, as well as violations that continue on a systemic basis and affect other children. The regulation also includes a three-year time limit for cases in which a parent requests reimbursement or corrective action. As evidenced by the comments on the issue of compensatory services under Part C (see discussion regarding § 303.510 above), compensatory services may not be an appropriate remedy in some cases. Therefore, the language regarding the three-year limit in these regulations should be changed to describe more accurately the remedies that may be requested, such as a parent's request for reimbursement for amounts spent to provide services in the IFSP that were not provided by the lead agency.

As noted above in the response to comments on § 303.510, these regulations do not prohibit individuals from filing a complaint with the lead agency after the child has left the Part C system, and require, within the timeframes noted, that the State resolve the complaint. In addition, States are free to accept and resolve complaints regarding alleged violations that occurred outside these timelines, just as they are free to add additional protections in other areas that are not inconsistent with the requirements of the Act and its implementing regulations. If a State law provided a more generous timeline for filing complaints, the State could certainly use that timeline; it could, in the alternative, amend its State law to be as restrictive, but not more restrictive, than these Federal regulations.

Regarding the issue of when it is appropriate for an organization, rather than an individual, to file a complaint, the State complaint procedures broadly permit any organization to file a complaint alleging that the State is violating IDEA, in order to permit entities, as well as individuals, that become aware of violations to raise them. With regard to the statement in the note that the lead agency must resolve complaints even if received from an individual or organization outside of the State, the lead agency is responsible for ensuring compliance with Part C. A complaint about implementation of the Act filed by an organization or individual outside of the State is an additional means of bringing compliance issues to the State's attention. To be consistent with the decision to remove all notes from the Part B regulations, and to make clear that complaints from out-of-State organizations or individuals must also be resolved, that concept is integrated into § 303.510(a)(1).

Changes: The language in proposed § 303.511(c) has been moved to paragraph (b) and changed to describe more accurately the remedies that could be requested under the three-year limitation for State complaints. The note following § 303.511 regarding complaints filed by organizations or individuals from another State has been deleted, and the substance of the note has been moved to § 303.510(a)(1).

Minimum State Complaint Procedures; Timelines (§ 303.512)

Comment: One commenter asked whether eliminating the right to request Secretarial review would eliminate all potential appeals of a State's decision. The commenter requested that a note be added to reference other procedures still available if the complainant is not satisfied with a State's decision.

Discussion: If a complainant who wishes to contest a lead agency's decision on a State complaint is a parent, he or she may request a due process hearing under § 303.420 concerning a child's identification, evaluation, or placement, or the provision of appropriate early intervention services to the child and the child's family. In addition, States must make mediation under § 303.419 available, at a minimum, when a parent requests a due process hearing. States may provide for mediation at an earlier stage, thereby allowing for informal dispute resolution before or after the State complaint process, preventing the need for a due process hearing. However, mediation may not be used to deny or delay the parents' right to due process. The previous existence of the option to request Secretarial review was not a substitute for these other procedural rights for parents. It is not necessary to add a note describing these other procedural safeguards in § 303.512, as they are adequately described elsewhere in these regulations.

The substance of the notes following this section is incorporated into § 303.512. The language of proposed Note 1 references a complaint that is also the subject of a due process hearing, but does not discuss the situation of a complaint that also becomes the subject of a mediation proceeding. Although the IDEA Amendments of 1997 encourage the use of mediation as a dispute resolution tool, a party's mediation request should not serve as an excuse for a State to delay the State complaint resolution timelines. Therefore, a mediation proceeding should not in and of itself be considered an "exceptional circumstance" under § 303.512(b) so as to extend the 60-day time limit for resolution of complaints, unless the parties agree to such an extension.

Changes: Paragraphs (b) and (c) have been combined into a new paragraph (b). A new paragraph (c) has been added to clarify that if an issue in a complaint is the subject of a due process hearing, that issue (but not those outside of the due process proceeding) would be set aside until the conclusion of the due process hearing, and that the hearing decision regarding an issue in a due process hearing would be binding in a State complaint resolution; however, a public agency's failure to implement a due process decision would have to be resolved by the lead agency. The notes following this section have been removed, and their substance incorporated into § 303.512.

Policies Related to Payment for Services (§ 303.520)

Comment: There were many comments regarding the use of private and public insurance under Part C. A few commenters supported proposed § 303.520(d) and (e), as well as corresponding notes. Supporting the provision in proposed § 303.520(d) on requiring families to use private insurance only if there are no costs, parents of children with disabilities described the financial costs and resulting hardship to them when required to use private insurance to pay for services.

Many commenters opposed the proposed changes. Regarding the use of private insurance, many stated that the policies in proposed § 303.520(d) and Notes 1 and 2 contradict the "payor of last resort" concept underlying Part C. Many commenters referred to the policy in § 303.527 that Part C Federal funds are to supplement existing sources of funds, not provide full support, for early intervention. Commenters stated that prior to Part C, private insurance would have been the payor of first resort for many early intervention services, and Medicaid the secondary source of payment.

Commenters also stressed that, because FAPE does not apply to Part C, basing § 303.520(d) on the Notice of Interpretation published in 1980 regarding Part B, six years prior to the passage of Part C, is invalid. Further, in emphasizing the differences in Part B and Part C policy, commenters noted that under Part B, services are to be provided at no cost to the parents, whereas under Part C parents may be required to pay fees for services. Commenters stated that it is contradictory to allow systems of payment, but prohibit the use of private insurance if there is a financial cost to families. A few commenters also stated they believed the Department did not adequately determine whether or not there is a cost to parents in requiring the use of private insurance, and that a cost-benefit analysis was not done.

Commenters were also very concerned about the impact to Part C programs nationwide if private insurance is more difficult to access; some stated that proposed § 303.520(d) could cause States to eliminate their infant and toddler programs entirely. Commenters stated that because Federal programs like Medicaid and Title V require that private insurance must be billed first for services covered in whole or in part by such insurance, if private insurance is not accessible, Medicaid or Title V will not be accessible. Some commenters suggested that the use of private insurance under Part C be treated in the same manner as it is under Title V and Medicaid and in this way remain in compliance with the mandate of § 303.527.

In addition, some commenters stated that a policy that allows parents to deny access to private insurance, thereby requiring the expenditure of State and Federal funds, has caused private insurance companies to deny payment for services if Part C potentially covers the service. Insurance policies also often state that they will not cover services if deductibles and co-payments are paid *for* the family instead of *by* the family. Commenters also stated that some State statutes require that private insurance is utilized prior to State funds and the proposed § 303.520 undermines these statutes.

Regarding public insurance, commenters stated that parental consent should not be required for access to public insurance, e.g., Medicaid, if the child is eligible for the public insurance. The commenters also argued that States should be given the flexibility to require application for public health insurance as a condition for receiving early intervention services, not only to enable Part C access to other sources of funding, but also to ensure that children have access to health and medical care.

Those commenting against proposed § 303.520(e) and Note 3, regarding proceeds from insurance, stated that such a rule potentially precludes putting dollars back into an already under funded program. Commenters stated that under 34 CFR 80.25, States should be required to return income received from public and private insurance payments to the Part C program. Further, if the Department does not require such reinvestment, commenters requested that it at least remain silent on the issue rather than risk giving States encouragement for using insurance reimbursements without any restrictions.

Discussion: As the foregoing comments note, there are many ramifications to a proposed regulation regarding the use of private and public insurance under Part C. Therefore, the policy in proposed § 303.520(d) will not be finalized until more thorough examination of the issues can be done through the process initiated by the April 14 and August 14, 1998 solicitations for comments, and in light of the specific Part C statutory language and framework.

However, with respect to the issue of reimbursements in proposed § 303.520(e) and Note 3, the reasons underlying the changes made to the corresponding § 300.142(f) in Part B provide support for the same changes in Part C. This section clarifies that if a public agency receives funds from public or private insurance for services under these regulations, the public agency is not required to return those funds to the Department or to dedicate those funds for use in the Part C program, which is how program income must be used, although a public agency retains the option of using those funds in this program if it chooses to do so. Reimbursements are similar to refunds.

credits, and discounts that are specifically excluded from program income in 34 CFR 80.25(a). The expenditure that is reimbursed is considered to be an expenditure of funds from the source that provides the reimbursement. Nothing in IDEA, however, prohibits States from reinvesting insurance reimbursements back into the Part C program, and this regulatory provision should not be viewed as discouraging such practice. Reinvestment of insurance reimbursements in the Part C program is undeniably a valuable method of helping fund the program; however, to avoid confusion, it is necessary to clarify by regulation that no current Federal law requires such reinvestment.

In addition, proposed paragraph (e) has been revised to clarify that funds expended by a public agency from reimbursements of Federal funds will not be considered State or local funds for purposes of § 303.124. If Federal reimbursements were considered State and local funds for purposes of the supplanting prohibition in § 303.124 of these regulations, States would experience an artificial increase in their base year amounts and would then be required to maintain a higher, overstated level of fiscal effort in the succeeding fiscal year.

Changes: Proposed § 303.520(d), and Notes 1 and 2, are removed; proposed § 303.520(e) is redesignated as § 303.520(d) with changes to conform to § 300.142(f); and Note 3 is incorporated into the text of § 303.520(d).

(Note: This attachment will not be codified in the Code of Federal Regulations)

Attachment 2—Executive Order 12866

These regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

Summary of Public Comments

Many commenters expressed concern about the costs and burden of complying with requirements incorporated into the Assistance to States for the Education of Children with Disabilities, Notice of Proposed Rulemaking (NPRM). Commenters complained about the cost of implementing various statutory requirements incorporated into the NPRM and identified a variety of requirements in the NPRM not required by the statute that would increase administrative costs for school districts. Some commenters talked about the need to employ additional staff to comply with new requirements and others talked about the additional paperwork required. Some commenters expressed concern about the effect of the requirements on the ability of schools to provide instruction to nondisabled children and the difficulty teachers and administrators would have in implementing the proposed regulations. Very few commenters specifically addressed the Department's analysis of the benefits and costs of the statutory and non-statutory changes incorporated into the proposed regulations.

One commenter stated that the analysis of the impact was inadequate and that the cost to school systems did not appear to be taken seriously. However, this commenter did not provide comments on the cost assumptions or analysis of specific items in the NPRM.

One commenter questioned the discussion in the NPRM that indicated a possible reduction of personnel needed to conduct evaluations by 25 to 75 percent, and suggested that additional meetings would probably be required for 18 to 24 months until the appropriate assessments can be conducted at annual reviews and that additional personnel would be needed. Another commenter agreed that the changes related to the conduct of the triennial reevaluation may reduce some paperwork, but noted that savings would not be realized immediately for individual children because of the need for baseline data. One commenter stated that it has taken the evaluation team one hour just to decide whether there is a need to gather additional information.

A few commenters provided specific information about the cost and time involved to comply with some of the requirements that were analyzed in the NPRM. For example, one commenter pointed out that it would cost his district $18,000 to provide for substitute teachers so regular education teachers could attend 900 IEP meetings lasting one to two hours—or $20 per meeting. Another commenter stated that the cost of providing substitute teachers would be an enormous burden for school districts, noting that the average IEP meeting takes 1.5 to 2 hours.

The Department also received a few comments on the cost of providing education to children who have been suspended or expelled. One commenter said that the projections do not take into account the expense of providing homebound services, alternative placements or access to the general curriculum. Another commenter agreed that the estimates of $29–$70 were too low and pointed out that an out-of-district day placement in Vermont runs about $20,000–$25,000 per school year.

All of these comments were considered in conducting the analysis of the benefits and costs of the final regulations. All of the Department's estimates and the assumptions on which they are based are described below.

Summary of Potential Benefits and Costs

Benefits and Costs of Statutory Changes

For the information of readers, the following is an analysis of the costs and benefits of the most significant statutory changes made by IDEA Amendments of 1997 that are incorporated into the Assistance to States for the Education of Children with Disabilities regulations. In conducting this analysis, the Department examined the extent to which changes made by the IDEA Amendments of 1997 added to or reduced the costs for school districts and others in relation to the costs of implementing the IDEA prior to the enactment of the IDEA Amendments of 1997. Based on this analysis, the Secretary has concluded that the statutory changes included in this regulation will not, on net, impose significant costs in any one year, and may result in savings to State and local educational agencies. An analysis of specific provisions follows:

Participation in Assessments

Section 300.138 incorporates statutory requirements relating to the inclusion of children with disabilities in general State and district-wide assessments and the conduct of alternate assessments for children who cannot be appropriately included in general assessments.

Although children with disabilities have not been routinely included in State and district-wide assessments, the requirement to include children with disabilities in assessment programs in which they can be appropriately included, with or without accommodations, does not constitute a change in Federal law. Because this statutory change is a clarification of, not a change in, the law, no cost impact is assigned to this requirement, which is incorporated in § 300.138(a) requiring the participation of children with disabilities in general assessments.

However, States were not previously required to conduct alternate assessments for children who could not participate in the general assessments. The statutory requirement to develop and conduct alternate assessments beginning July 1, 2000, therefore, imposes a new cost for States and districts.

The impact of this change will depend on the extent to which States and districts administer general assessments, the number of children who cannot appropriately participate in those assessments, the cost of developing and administering alternate assessments, and the extent to which children with disabilities are already participating in alternate assessments.

The analysis of the impact of this requirement assumes that alternate tests would be administered to children with disabilities on roughly the same schedule as general assessments. This schedule will vary considerably from State to State and within States, depending on their assessment policy. In most States, this kind of testing does not begin before the third grade. In many States and districts, general assessments are not administered to children in all grades, but rather at key transition points (for example, in grades 4, 8, and 11).

The extent to which States and districts will need to provide for alternate assessments will also vary depending on how the general assessments are structured. Based on the experience of States that have implemented alternate assessments for children with disabilities, it is estimated that about one to two percent of the children in any age cohort will be taking alternate assessments.

Based on this information, it is estimated that about 18 to 36 million of the children who are expected to be enrolled in public schools in school year 2000–2001 will be candidates for general assessments. Of these, about 200,000 to 700,000 will be children with disabilities who may require alternate assessments.

The costs of developing and administering these assessments are also difficult to gauge. In its report *Educating One and All*, the National Research Council states that the estimated costs of performance-based assessments programs range from less than $2 per child to over $100 per student tested. The State of Maryland has reported start-up costs of $191 per child for testing a child with a disability and $31 per child for the ongoing costs of administering an alternate assessment.

The cost impact of requiring alternate assessments will be reduced to the extent that children with disabilities are already participating in alternate assessments. Many children with disabilities are already being assessed outside the regular assessment program in order to determine their progress in meeting the objectives in their IEPs. In many cases, these assessments might be adequate to meet the new statutory requirement.

Based on all of this information, the cost impact of this statutory change is not likely to be significant, and will be justified by the benefits of including all children in accountability systems.

Incidental Benefits

The change made by section 613(a)(4) of the Individuals with Disabilities Education Act (IDEA), incorporated in § 300.235, generates savings by reducing the time that would have been spent by special education personnel on maintaining records on how their time is allocated in regular classrooms among children with and without disabilities.

To calculate the impact of this change, one needs to estimate the number of special education personnel who will be providing services to children with and without disabilities in regular classrooms and the amount and value of time that would have been required to document their allocation of time between disabled and nondisabled children.

Based on State-reported data on placement, it appears that about 4.4 million children will spend part of their day in a regular classroom this school year. States reported employing about 404,000 teachers and related services personnel in total for school year 1995–96. The statutory change will eliminate unnecessary paperwork for those special education personnel who have been working in the regular classroom and documenting their allocation of time, and will encourage the provision of special education services in the regular classroom—a change that will benefit children with disabilities.

Individualized Education Programs

The final regulations incorporate a number of statutory changes in section 614(d) that relate to the IEP process and the content of the IEP. With the exception of one requirement (the requirement to include a regular education teacher on the IEP team), it has been determined that, on balance, these changes will not increase the cost of developing IEPs. Moreover, all the changes will produce significant benefits for children and families. Key changes include:

Clarifying that the team must consider a number of special factors to the extent they are applicable to the individual child. The statutory changes that are incorporated in § 300.346 do not impose a new burden on school districts because the factors that are listed should have been considered, as appropriate, under the IDEA before the enactment of IDEA Amendments of 1997. These include: behavioral interventions for a child whose behavior impedes learning, language needs for a child with limited English proficiency, Braille for a blind or visually impaired child, the communication needs of the child, and the child's need for assistive technology.

Strengthening the focus of the IEP on access to the general curriculum in statements about the child's levels of performance and services to be provided. The statutory changes that are incorporated in § 300.347 relating to the general curriculum should not be burdensome because the changes merely refocus the content of statements that were already required to be included in the IEP on enabling the child to be involved in and progress in the general curriculum.

Requiring an explanation of the extent to which a child will not be participating with nondisabled children. This statutory requirement, which is incorporated in § 300.347(a)(4), does not impose a burden because it replaces the requirement for a statement of the extent to which the child will be able to participate in regular educational programs.

Requiring the IEP to include a statement of any needed modifications to enable a child to participate in an assessment, and, in cases in which a child will not be participating in a State or district-wide assessment, to include a statement regarding why the assessment is not appropriate and how the child will be assessed. This statutory requirement, which is incorporated in § 300.347(a)(5), will require some additional information to be included in the IEPs for some children, but will not impose a significant burden on schools. Each year an estimated 1.6 to 3.2 million children with disabilities are in grades in which schools are administering State or district-wide assessments. Prior to the enactment of the IDEA Amendments of 1997, Federal law required the participation of children with disabilities in general assessments with accommodations, as needed. Data indicate that about 50 percent of children with disabilities have been participating in State and local assessments. Many of these children are receiving needed modifications and their IEPs currently include information about those modifications. The requirement for statements in the IEP about how children will be assessed will affect IEPs for children who cannot participate in the general assessments and who are entitled to participate in alternate assessments (estimated to be 200,000 to 700,000 children, beginning in school year 2000–2001).

Allowing the IEP team to establish benchmarks rather than short-term objectives in each child's IEP. There is considerable variation across States, districts, schools, and children in the amount of time spent on developing and describing short-term objectives in each child's IEP. While it would be difficult to estimate the impact of this statutory change, contained in § 300.347(a)(2), it clearly affords schools greater flexibility and an opportunity to reduce paperwork in those cases in which the team has previously included unnecessarily detailed curriculum objectives in the IEP document. This change potentially reduces the burden in preparing IEPs for 6 million children each year.

Prior to the enactment of the IDEA Amendments of 1997, IDEA required the participation of the "child's teacher," typically read as the child's special education teacher, but it did not explicitly require a regular education teacher. The IDEA Amendments of 1997, incorporated in § 300.344 (a)(2) and (a)(3) and § 300.346(d) of the final regulations, require the participation of the child's special education teacher and a regular education teacher if the child is or may be participating in the regular education classroom, while acknowledging that a regular education teacher participates in developing, reviewing, and revising the child's IEP "to the extent appropriate."

The impact of this change will be determined by the number of children with disabilities who are or who may be participating in the regular classroom in a given year, the number and length of IEP meetings, the extent of the regular education teacher's participation in them, the opportunity cost of the regular education teacher's participation, and the extent to which regular education teachers are already attending IEP meetings.

State-reported data for school year 1994–1995 indicates that about 3.9 million children with disabilities aged 3 through 21 spend at least 40 percent of their day in a regular classroom (children reported as placed in regular classes and resource rooms). The participation of the regular education teacher would be required for all of these children since these children are spending at least part of their day in the regular classroom.

State data also show that an additional 1.2 million children were served in separate classrooms. A regular education teacher's participation will clearly be required for those children in separate classes who are spending part of their school day in regular classes (less than 40 percent of their day). Other children may be participating with nondisabled children in some activities in the same building. While a child's individual needs and prospects will determine whether a regular education teacher would need to attend a child's IEP meeting in those cases, some proportion of these children are children for whom participation in regular classrooms is a possibility, therefore requiring the participation of a regular education teacher.

Although the prior statute did not require the participation of a regular education teacher, it is not uncommon for States or school districts to require a child's regular education teacher to attend IEP meetings.

Based on all of this information, it is estimated that the participation of a regular education teacher may be required in an additional 3.9 to 5.3 million IEP meetings in the next school year.

While the opportunity costs of including a regular education teacher in these meetings will be significant because of the number of meetings involved, these costs will be more than justified by the benefits to be realized by teachers, schools, children, and families. Involving the regular education teacher in the development of the IEP will not only provide the regular education teacher with needed information about the child's disability, performance, and educational needs, but will help ensure that a child receives the supports the child needs in the regular classroom, including services and modifications that will enable the child to progress in the general curriculum.

Parentally-Placed Students in Private Schools

This statutory change, which is incorporated in § 300.453, would require school districts to spend a proportionate amount of the funds received under Part B of IDEA on services to children with disabilities who are enrolled by their parents in private elementary and secondary schools.

The change does not have an impact on most States because the statute does not represent a change in the Department's interpretation of the law as it was in effect prior to the enactment of the IDEA Amendments of 1997. However, in four Federal circuits, the courts have concluded that, without the statutory change, school districts generally were responsible for paying for the total costs of special education and related services needed by students with disabilities who have been parentally-placed in private schools. Therefore, this change does produce potential savings for school districts in those 19 States affected by these court decisions. The States are: Arkansas, Colorado, Connecticut, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, New Mexico, Nebraska, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah, Vermont, and Wyoming.

To determine the impact of the change, one needs to estimate the number of parentally-placed children with disabilities that LEAs in these States would have been required to serve, but for this change. Using private school enrollment data for school year 1995–1996 and projected growth rates, it is estimated that approximately 1.5 million students will be enrolled in private schools in these 19 States in this school year.

There is no reliable data on the number of children with disabilities who are parentally-placed in private schools. However, if one assumes that children with disabilities are found in private schools in the same proportion as they are found in public schools in these States, or at least in the same proportion that children with speech impairments and learning disabilities are found in public schools, one would estimate that there are between 80,000 and 120,000 children with disabilities who are parentally-placed in private schools.

If one assumes that, on average, the cost of providing a free appropriate education to these students would be approximately equal to the average excess costs for educating students with disabilities—$7,184 per child for school year 1998–1999—the costs of providing FAPE to these children would be significant.

Under the statutory change, LEAs schools would still be required to use a portion of the Federal funds provided under Part B of IDEA to provide services to parentally-placed children—an amount proportionate to the percentage of the total population of children with disabilities who are parentally-placed—and to carry out required child find and evaluation activities. Therefore, in estimating the impact of this statutory change, one needs to subtract the cost of these public school obligations from the total projected savings. One would also need to take into account the fact that some of the costs that would have been covered by the school districts will simply shift to other sources such as the private schools or the families of the children. However, even if one discounts the amount of projected savings to the public sector by 50 percent to take into possible cost-shifting, the total net savings attributable to the change in the law for these 19 States is expected to be very significant.

Mediation

Section 300.506 reflects the new statutory provisions in section 615(e) of IDEA, which require States to establish and implement mediation procedures that would make mediation available to the parties whenever a due process hearing is requested. IDEA specifies how mediation is to be conducted.

The impact of this change will depend on the following factors: the number of due process hearings that will be requested, the extent to which the parties to those hearings will agree to participate in mediation, the cost of mediation, the extent to which mediation would have been used in the absence of this requirement to resolve complaints, and the extent to which mediation obviates the need for a due process hearing.

Data for previous years suggests one can expect about one complaint for every 1000 children served or about 6,000 requests for due process hearings during this school year. This projection probably overstates the number of complaints because it does not take into account the effect of the IDEA Amendments of 1997, which, on balance, can be expected to result in better implementation of the law and higher parental satisfaction with the quality of services and compliance with IDEA.

Many of these complaints would have been resolved through mediation even without the statutory change. Over 39 States had mediation systems in place prior to the enactment of the IDEA Amendments of 1997. Data for 1992 indicate that, on average, States with mediation systems held mediations in about 60 percent of the cases in which hearings were requested. Nevertheless, the number of mediations is expected to increase even in States that already have mediation systems. Although most States report using mediation as a method of resolving disputes, there have been considerable differences in its implementation and use. In general, the extent to which mediation has been used in States probably depends on the extent to which parents and others were informed of its availability and possible benefits in resolving their complaints and the extent to which the mediator was perceived as a neutral third-party. The changes made by the IDEA Amendments of 1997 are expected to eliminate some of the differences in State mediation systems that have accounted for its variable use and effectiveness.

The benefits of making mediation more widely available are expected to be substantial, especially in relation to the costs. States with well-established mediation systems conduct considerably fewer due process hearings. For example, in California, hearings were held in only 5 and 7 percent of the cases in which they were requested in 1994 and 1995, respectively. The average mediation appears to cost between $350 and $1000, while a due process hearing can cost tens of thousands of dollars. Based on the experience that many different States have had with mediation, it is estimated that hundreds of additional complaints will be resolved through mediation. The benefits to school districts and benefits to families are expected to be substantial.

Discipline

The final regulations (§§ 300.121, 300.122, 300.520, and 300.521) incorporate a number of significant changes to IDEA that relate to the procedures for disciplining children with disabilities.

Some of the key changes contained in section 615(k) afford school districts additional tools for responding to serious behavioral problems, and in that regard, do not impose any burdens on schools or districts.

The statutory change reflected in § 300.520(a)(2) would give school officials the authority to remove children who engaged in misconduct involving weapons or illegal drugs. Under prior law, school officials had the authority to remove children who brought guns, but could not remove children who engaged in misconduct involving other weapons or illegal drugs over the objection of their parents unless they prevailed in a due process proceeding or obtained a temporary restraining order from a court. The statutory change reflected in § 300.521 would give school officials the option of seeking relief from a hearing officer rather than a court in the case of a child the school is seeking to remove because the child poses a risk of injury to the child or others. In both cases, the child would continue to receive services in an alternative educational setting that is required to meet certain standards. It is difficult to assess the impact of either of these statutory changes on schools because there is virtually no information available on the extent to which parents disagree with districts that propose to remove these children. This new authority would only be used in those cases. Nevertheless, the benefits of this authority appear to be substantial insofar as the changes help schools provide for a safe environment for all children, while ensuring that any children with disabilities who are moved to an alternative setting continue to receive the services they need.

The statutory change reflected in § 300.520(b) will require school officials to

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convene the IEP team in certain cases in which removal is contemplated to develop an assessment plan and behavioral interventions (or that the IEP team members review the child's behavioral intervention plan if there is one). The impact of this requirement is discussed below as part of the discussion of non-statutory changes.

The requirement in section 612(a)(1)(A), incorporated in § 300.121, that all children aged 3 through 21 must have made available to them a free appropriate public education, including children who have been suspended or expelled from school, does not represent a change in the law as the law was interpreted by the Department prior to the enactment of the IDEA Amendments of 1997. It clarifies the Department's long-standing position that the IDEA requires the continuation of special education and related services even to children who have been expelled from school for conduct that has been determined not to be a manifestation of their disability.

However, this statutory change does represent a change in the law in two circuits in which Federal Circuit courts disagreed with the Department's interpretation of the law—the 4th and 7th Circuits. The affected States are: Virginia, Maryland, North Carolina, South Carolina, West Virginia, Illinois, Indiana, and Wisconsin.

To assess the impact of this change, one needs to estimate the extent to which students would have been excluded from education, but for this change in the statute, and the cost of providing the required services to these students during the period they are expected to be excluded from their regular school due to a long-term suspension or expulsion.

There is a paucity of data available on disciplinary actions, and very little for the States in the 4th and 7th Circuits. Using data collected by the Office for Civil Rights for school year 1994, it is estimated that approximately 60,000 students with disabilities aged 6 through 21 will be suspended during this school year in the affected States. But to determine the impact of the prohibition on ceasing services in these States, one needs to know the number of suspensions each student received and their duration—information that is not provided by OCR data. However, more detailed data compiled by a few States would suggest that a relatively small percentage of students with disabilities who are suspended (no more than about 15 percent) receive suspensions of greater than 10 days at a time and a much smaller number of students are expelled.

Little information is available on the cost of providing services in an alternative setting for a student who has been suspended temporarily or expelled from school. However, it is reasonable to assume that the average cost per day of providing services in an alternative setting probably would be no less than the average daily total costs of serving children with disabilities, which is about $75 per day. Although costs will vary considerably depending on the needs of the individual student and the type of alternative setting, costs are likely to be higher on average because districts are unlikely to be able to achieve the same economies of scale in providing services to small numbers of children in alternative settings as they do in serving children generally.

While this statutory change will have a cost impact on the States in the 4th and 7th Circuits, the costs for these States will be justified by the benefits of continuing educational services for children who are the least likely to succeed without the help they need.

The statutory change reflected in § 300.122 could generate potential savings for all States by removing the obligation to provide educational services to individuals 18 years old or older who were incarcerated in adult prisons and who were not previously identified as disabled. No information is available on the number of prisoners with disabilities who were not previously identified.

Triennial Evaluation

The previously existing regulations required a school district to conduct an evaluation of each child served under IDEA every three years to determine, among other things, whether the child is still eligible for special education. The IDEA Amendments of 1997 change this requirement to reduce unnecessary testing and therefore reduce costs. Specifically, section 614(c) of IDEA, incorporated in § 300.533, allows the evaluation team to dispense with additional tests to determine the child's continued eligibility if the team concludes this information is not needed. However, these tests must be conducted if the parents so request.

The savings resulting from this change will depend on the following factors: the number of children for whom an evaluation is conducted each year to comply with the requirement for a triennial evaluation, the cost of the evaluation, and an estimate of the extent to which testing will be reduced because it is determined by the IEP team to be unnecessary and is not requested by the parents.

Based on an analysis of State-reported data, it is estimated that approximately 1.5 million children will be eligible for triennial evaluations in school year 1998–1999 or roughly 25 percent of the children to be served.

The IDEA Amendments of 1997 make it clear that districts no longer need to conduct testing to determine whether a child still has a disability, if the evaluation team determines this information is not needed and the parent agrees. However, while the regulation permits the team to dispense with unneeded testing to determine whether the child still has a disability, the team still has an obligation to meet to review any existing evaluation data and to identify what additional data are needed to determine whether the child is still eligible for special education and related services, the present levels of performance of the child, and whether any modifications in the services are needed. In view of these requirements, it is assumed that there will be some cost associated with conducting the triennial evaluation even in those cases in which both the team and the parents agree to dispense with testing. It is estimated that the elimination of unnecessary testing could reduce the opportunity costs for the personnel involved in conducting the triennial evaluation by as much as 25 to 75 percent. While there is no national data on the average cost of conducting a triennial evaluation under the current regulations, it is assumed that a triennial evaluation would require the participation of several professionals for several hours and cost as much as $1000.

These savings would be somewhat mitigated by the increased costs associated with the new statutory requirement to obtain parental consent before conducting a reevaluation. Under the final regulations, parental consent would be required if a test is conducted as part of a reevaluation, for example, or when any assessment instrument is administered as part of a reevaluation.

If one assumes, for purposes of this analysis, that savings are achievable in roughly half of the triennial evaluations that will be conducted and that elimination of unnecessary testing could reduce personnel costs by at least 25 percent, one would project substantial savings for LEAs that are attributable to this change.

Benefits and Costs of Proposed Non-statutory Regulatory Provisions

The following is an analysis of the benefits and costs of the nonstatutory final regulatory provisions that includes consideration of the special effects these changes may have for small entities.

The final regulations primarily affect State and local educational agencies, which are responsible for carrying out the requirements of Part B of IDEA as a condition of receiving Federal financial assistance under IDEA. Some of the proposed changes also affect children attending private schools and consequently indirectly affect private schools.

For purposes of this analysis as it relates to small entities, the Secretary has focused on local educational agencies because these regulations most directly affect local school districts. The analysis uses a definition of small school district developed by the National Center for Education Statistics for purposes of its recent publication, "Characteristics of Small and Rural School Districts." In that publication, NCES defines a small district as "one having fewer students in membership than the sum of (a) 25 students per grade in the elementary grades it offers (usually K–8) and (b) 100 students per grade in the secondary grades it offers (usually 9–12)". Using this definition, approximately 34 percent of the Nation's school districts would be considered small and serve about 2.5 percent of the Nation's students. NCES reports that approximately 12 percent of these students have IEPs.

Both small and large districts will experience economic impacts from this rule. Little data are available that would permit a separate analysis of how the changes affect small districts in particular.

This analysis assumes that the effect of the final regulations on small entities would be roughly proportional to the number of children with disabilities served by those districts.

For school year 1998–1999, we estimate that approximately 47 million children will be enrolled in public elementary and secondary schools. Using the NCES definition and assuming all districts grew at the same rate between school year 1993–1994 and 1998–1999, the Secretary estimates that approximately 1.18 million children are enrolled in small districts. Applying the NCES estimate of 12 percent, we estimate that these districts serve approximately 140,000 children with disabilities of the 6 million children with disabilities served nationwide.

There are many provisions in the final regulations that are expected to result in economic impacts—both positive and negative. This analysis estimates the impact of those non-statutory provisions that were not required by changes that were made in the statute by the IDEA Amendments of 1997. In conducting this analysis, the Department estimated the additional costs or savings for school district attributable to these provisions in relation to the costs of implementing the statute, as amended by the IDEA Amendments of 1997.

The following is a summary of the estimated economic and non-economic impact of the key changes in this final regulation:

Section 300.2—Applicability to public agencies—The regulations add charter schools to the list of entities to which the regulations apply. Language is also added in paragraph (b)(2) regarding the applicability of the regulations to each public agency that has direct or delegated authority to provide special education and related services in a State receiving Part B funds, regardless of that agency's receipt of Part B funds. Neither change imposes any additional burden; both were included for clarity.

Section 300.7—Child with a disability—The final regulations add a new paragraph (a)(2) to clarify that if a child has one of the disabilities listed in paragraph (a), but only needs a related service and not special education, the child is not a "child with a disability" under Part B, unless the service is considered special education under State standards. This change is not likely to affect the number of children eligible for services under this part substantially because this clarification reflects a longstanding interpretation of the Department.

Section 300.7(c)(1)—Autism—The final regulations amend the definition of "autism" to clarify that if a child manifests characteristics of this disability category after age 3, the child could be diagnosed as having "autism" if the other criteria are satisfied. This clarification does not impose any additional burden on LEAs.

Section 300.7(c)(9)—Attention deficit disorder—The final regulations amend the definition of "other health impairment" to add ADD/ADHD to the list of conditions that could render a child eligible for services under this part. The language relating to other health impairments is also modified to clarify that limited strength, vitality or alertness includes a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment. This change will not increase costs for LEAs because it reflects the Department's longstanding policy interpretation regarding the eligibility of children with ADD/ADHD.

Section 300.8—Definition of day—The final regulations add definitions of "day," "business day," and "school day," terms that are used in the statute. Including these definitions will reduce confusion about the meaning of these terms and will not impose costs. The definition of "day" represents the Department's longstanding interpretation of that term. In defining "business day," the Department used a commonly understood measure of time so that both parents and school officials could easily understand timelines established in the regulations.

Section 300.10—Definition of educational service agency—The final regulations clarify that the term "educational service agency" includes agencies that meet the definition of "intermediate educational units" under prior law. This change does not impose any costs on States.

Section 300.18—Charter schools as LEAs—The final regulations amend the definition of an "LEA" to include public charter schools established as LEAs under State law. This change, which adds clarity, does not impose any costs.

Section 300.19—Native language—The final regulations expand the definition of "native language" to clarify that in all direct contact with the child, communication must be in the language normally used by the child and not the parents if there is a difference between the two, and that for individuals with deafness or blindness, or for individuals with no written language, the mode of communication would be that normally used by the individual. This clarification does not impose any additional costs for LEAs beyond what Federal law would already require.

Section 300.20—Foster parents—The final regulations clarify that foster parents may act as parents unless State law prohibits such practice. This provision does not impose any costs. The definition is intended to promote the appropriate involvement of foster parents consistent with the best interests of the child by ensuring that those who best know the child are involved in decisions about the child's education. To the extent there is any economic impact, it should reduce costs on States and local agencies that they would otherwise incur for training and appointing surrogate parents for children whose educational interests could appropriately be represented by their foster parents.

Section 300.22—Definition of public agency—The final regulations add public charter schools to the list of public agencies. This change does not impose any additional costs on States as Federal law already requires States to be ultimately responsible for ensuring FAPE for all children with disabilities in public schools in the State.

Section 300.24—Related services—The final regulations modify the definition of occupational therapy to make clear that it encompasses services provided by a qualified occupational therapist—a clarification that does not impose any additional costs. The final regulations revise the definition of parent counseling and training to include helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

Section 300.26(b)(3)—Definition of "specially-designed instruction"—Paragraph (b)(3) defines "specially-designed instruction" in order to give more definition to the term "special education," which is defined in this section as "specially-designed instruction." The definition is intended to clarify that the purpose of adapting the content, methodology, or delivery of instruction is to address the child's unique needs and to ensure access to the general curriculum. This provision increases the potential of children with disabilities to participate more effectively in the general curriculum.

Section 300.26—Travel training—The final regulations amend the definition of "special education" to include a reference to travel training in paragraph (a)(2) and a definition of travel training in paragraph (b)(4)—clarifications that do not impose any additional costs.

Section 300.121—Free appropriate public education—The final regulations add language to clarify that the responsibility to provide FAPE beginning no later than a child's third birthday means that an IEP or IFSP must be in effect by that date, and that a child turning three during the summer must receive services if the IEP team determines that the child needs extended school year services. This language, which represents the Department's longstanding interpretation of the statute, does not impose any additional burden on LEAs. The final regulations also include language in paragraph (e) to clarify that the group determining a child's eligibility must make an individualized determination as to whether a child who is progressing from grade to grade needs special education and related services—another clarification that does not impose any additional costs for LEAs.

Section 300.121—FAPE for Children suspended or expelled from school—Section 300.121 incorporates the statutory provision that the right to a free appropriate public education extends to children with disabilities who have been suspended or expelled from school. Paragraph (d)(1) clarifies that a public agency need not provide services to a child who has been suspended for fewer than 10 days in a school year if services are not provided to nondisabled children. Paragraph (d)(2) describes when and to what extent services must be provided to children who have been removed from their current educational placement for more than 10 school days in a given school year. Paragraph (d)(2) provides that the public agency must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and advance toward achieving the goals in the child's IEP if the suspension is for 10 school days or less or is for behavior that is not a manifestation of the child's disability. In the case of suspensions of 10 days or fewer, school personnel, in consultation with the special education teacher, determine if, and to what extent services must be provided to a child who has been suspended for more than 10 days in a given school year. In the case of suspensions of more than 10 days, this determination would be made by the IEP team. Paragraph (d)(2) also refers to the statutory standard for services for children removed for misconduct involving weapons, drugs, and substantial likelihood of injury.

In determining whether and how to regulate on this issue, the Department considered the impact of various alternatives on small and large school districts and children with disabilities and their families, especially the adverse educational impact on a child who has been suspended for more than a few days and on more than one occasion. The final regulations strike an appropriate balance between the educational needs of students and the burden on schools. Schools will be relieved of the potential obligation to provide services for a significant population of children who are briefly suspended a few times during the course of the school year, but required to consider the educational impact of suspensions on children with chronic or more serious behavioral problems who are repeatedly excluded from school.

The cost of this regulation depends on how the statutory requirement to provide services to children who have been suspended or expelled is interpreted. If the statute is read to require schools to provide services to all children who are suspended for one or more school days, this regulation would result in substantial savings for school districts. If the statute is read to give schools the flexibility not to provide services to children suspended for fewer than 10 school days at a time, regardless of the cumulative effect, as long as there is no pattern of exclusion that warrants treating an accumulation that exceeds 10 school days as a change in placement, this regulation would impose some additional costs.

Based on data collected by the Office for Civil Rights for school year 1992 and data on the number of children who are currently being served under IDEA, it is estimated that approximately 300,000 children with disabilities will be suspended for at least one school day during this school year. Many of these children will be suspended on more than one occasion for one or more days. Because of the differences among the children who are expected to be suspended and the range of their service needs, the costs of and the burden associated with providing individualized services in an alternative setting to every child who is suspended for one or more school days would be substantial. Limiting the requirement to children who have been suspended for more than 10 days in the school year would reduce costs substantially. Based on data from a few selected States, it appears that no more than about 45,000 of these 300,000 children with disabilities will be suspended for more than 10 days in a school year. Of these, an estimated 15,000 are expected to be suspended at least once for more than 10 consecutive days.

Section 300.122(a)(3)—Exception to right to FAPE (Graduation)—Paragraph (a)(3) provides that a student's right to FAPE ends when the student has graduated with a regular high school diploma, but not if the student graduates with some other certificate, such as a certificate of attendance, or a certificate of completion. The final regulations further clarify that graduation constitutes a change in placement, requiring written prior notice. Given the importance of a regular high school diploma for a student's post-school experiences, including work and further education, making it clear that the expectation for children with disabilities is the same as for nondisabled children provides a significant benefit to children with disabilities. The impact of this change, however, is difficult to assess. Many States, including most of those that report a high number of children with disabilities leaving school with a certificate of completion or some other certificate that is not a regular high school diploma, indicate that students with disabilities have the right to continue to work to earn a regular high school diploma after receiving that certificate. Little information is available to evaluate how many students who now can return to school after receiving some other certificate of completion do so, or how many would return to school if States are required to adopt a policy that clearly indicates that students who exited with a certificate have the right to continued services. Several State directors of special education indicated that relatively few students who now can return, do so. The cost of serving even 10,000 of the 25,000 students who exit each year with certificates would be substantial.

Section 300.125—Child find—The final regulations clarify the link between child find under Parts B and C. The final regulations also add language clarifying that the State's child find responsibilities extend to highly mobile children such as the homeless and migrant children and children progressing from grade to grade if they are suspected of having disabilities and in need of special education. None of these changes impose any requirements beyond what the statute has been interpreted to require.

Section 300.132(c)—LEA participation in transition planning conference—The regulations require an LEA representative to participate in planning conferences arranged by the lead agency for children who are receiving services under Part C and may be eligible for preschool services under Part B. This requirement does not result in significant costs for school districts. Only about 100,000 children age out of early intervention services each year and in many cases, LEA representatives have been participating in the transition planning conferences for these children, although they have not been required to do so.

Section 300.136—Personnel standards—The final regulations add new paragraphs (b)(3) and (b)(4) to clarify that a State is not required to establish any particular academic degree requirement for entry-level employment of personnel in a particular profession or discipline and that a State may modify its standard if it has only one entry-level academic degree requirement. This language clarifies the extent of flexibility afforded to States in meeting IDEA's personnel standards requirement and therefore may reduce costs for States and LEAs. The final regulations also add language in a new paragraph (g)(2) that explains that the State option relating to allowing LEAs to use the most qualified personnel available can be invoked even if a State has reached its established date for a specific profession—another clarification regarding the flexibility that is available to States. Language is added in a new paragraph (g)(3) that clarifies that a State that continues to experience shortages must address them in its CSPD.

Section 300.139—Reporting on assessments—The final regulations require SEA reports on wide-scale assessments to include children with disabilities in aggregated results for all children to better ensure accountability for results for all children. This regulation is expected to have a minimal impact on the cost of reporting assessment results. It could increase the number of data elements reported depending on whether States continue to report trend data for a student population that does not include children with disabilities to the extent required by § 300.138. There will be no impact on school districts since this requirement applies to reports that are prepared by the State educational agency.

Section 300.142—Medicaid reimbursement—The final regulations add language to paragraph (b)(1) specifying that a noneducational public agency may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context. A new paragraph (b)(3) has been added regarding the responsibility of State agencies and LEAs to provide all services described in a child's IEP in a timely manner regardless of which agency pays for the services. These clarifications of statutory requirements relating to interagency coordination between educational and noneducational agencies do not impose any additional costs.

Section 300.142(e)—Use of public insurance—Paragraph (e) describes the circumstances under which a public agency may access a parent's Medicaid or other public insurance to pay for required services. Paragraph (e)(2) provides that a public agency may not require parents to sign up for public insurance in order for their child to receive FAPE. Paragraph (e)(2) further clarifies that a public agency may not require parents to assume an out-of-pocket expense and may not use a child's benefits if that use would decrease available coverage, require the parents to pay for services that would otherwise be covered by public insurance, increase premiums or lead to discontinuation of insurance, or risk loss of eligibility for home and community-based waivers. Under the statute, public agencies are required to provide children with disabilities with a free, appropriate public education. It has been the Department's longstanding interpretation under IDEA and section 504 of the Rehabilitation Act that this means a public agency may not require parents of children with disabilities to use private insurance proceeds to pay for services their children are entitled to receive if the parents would incur a financial cost as a result. A financial cost would include an out-of-pocket expense, a decrease in coverage, or an increase in premiums. This interpretation is equally applicable to the use of public insurance. Although these changes appear to limit an LEA's access to public insurance to cover the costs of FAPE, all of these changes are based on the statutory requirement to provide FAPE and, therefore, do not impose additional costs on LEAs beyond what the law would require. Moreover, these clarifications would not affect the use of public insurance programs such as Early Periodic Screening, Diagnosis and Testing that do not impose any limits on coverage or require any co-payments.

Section 300.142(f) and (g)—Use of private insurance— Paragraph (f)(1) clarifies that public agencies may only access parents' private insurance to pay for required services if the parents consent to its use. As noted above, it has been the Department's longstanding interpretation that a public agency may not require parents to use private insurance proceeds to pay for services the child is entitled to receive if the parents would incur a financial cost as a result. Because it is reasonable to assume that use of private insurance will result in a financial cost in almost all cases, this provision, which would allow for the use of private insurance with parental consent, would increase options available to LEAs for accessing insurance—that is, in cases in which the parents consent, whether or not a financial cost is incurred.

However, to ensure that use of parents' insurance proceeds is voluntary and that parents do not experience unanticipated financial consequences, the final regulations require that parents provide informed consent. This consent must be obtained each time a public agency attempts to access private insurance. This clarification could have the effect of limiting access to the use of private insurance but is consistent with the Department's longstanding interpretation that such use must be voluntary.

A new paragraph (g) is added that clarifies that Part B funds may be used for services covered by a parent's public or private insurance and to cover the costs of accessing a parent's insurance such as paying deductible or co-pay amounts. This clarification does not impose any additional costs on LEAs.

Section 300.142(h)—Program income— This paragraph clarifies that a public agency that receives proceeds from insurance for services is not required to return those funds to the Department or dedicate those funds to this program and that funds expended by a public agency from reimbursement of Federal funds will not be considered reimbursement for purposes of §§ 300.154 and 300.231 of these regulations. This change increases flexibility for State and local agencies in using the proceeds from insurance.

Section 300.142(i)—Construction—This paragraph makes it clear that the IDEA regulations should not be read to alter the requirements imposed by other laws on a State Medicaid agency or any other agency administering a public insurance program. This clarification does not impose any additional costs.

Section 300.148—Public participation— The final regulations add language to clarify that if a policy or procedure has been through a State-required public participation process that is comparable to and consistent with the Federal requirements, the State would not have to subject the policy or procedure to public comment again. This should result in savings to States and would not increase burden.

Section 300.152—Commingling—Language has been added to clarify that the required assurance regarding commingling may be satisfied by the use of a separate accounting system that includes an audit trail of the expenditure of Part B funds and that separate bank accounts are not required. This guidance merely incorporates the Department's prior interpretation and does not add any burden for States.

Section 300.156(b)—Annual description of Part B set-aside funds—Paragraph (b) provides that if a State's plans for the use of its State level or State agency funds do not differ from those for the prior year the State may submit a letter to that effect instead of submitting a description of how the funds would be used. The effect of this regulation is inconsequential because it implements the Department's long-standing interpretation that a letter is sufficient in this case.

Section 300.197—Compliance—Paragraph (c) requires SEAs to consider adverse complaint decisions under the State complaint procedures in meeting their responsibilities under § 300.197 to determine whether any LEA or State agency is failing to comply. Consideration of these decisions is expected to impose minimal burden on States that are appropriately meeting their responsibilities under this section.

Section 300.231—Maintenance of effort (MOE)—The final regulations make it clear that an LEA meets the maintenance of effort requirement by spending at least the same total or average per capita amount of State and local school funds for the education of children with disabilities as in the prior year. This change reduces the burden on LEAs of maintaining spending on special education in those cases in which the State is willing to assume increased responsibility for funding.

Section 300.232—Exception to maintenance of effort— Paragraph (a) makes it clear that an LEA may only reduce expenditures associated with departing personnel if those personnel are replaced by qualified, lower-salaried personnel. Allowing LEAs to reduce their expenditures by not replacing departing personnel would violate congressional intent, as expressed in the House and Senate Committee reports, and diminish special education services in those districts. The final regulations also clarify that in those cases in which an LEA is invoking the exception to the MOE requirement and replacing personnel who have departed with lower salaried personnel, that this must be done consistent with school board policies, applicable collective bargaining agreements, and State law. This clarification of the relationship does not impose any additional burden beyond what local policies and law would otherwise impose.

Section 300.234—Schoolwide programs— The final regulations add language clarifying that children with disabilities in schoolwide projects must receive services in accordance with an IEP and must be afforded all of the rights and services guaranteed to such children under the IDEA. This clarification does not impose any additional burden on LEAs.

Section 300.280—Notice for public participation—The final regulations clarify what constitutes "adequate" notice in paragraphs (b) and (c) and do not impose any additional burden.

Section 300.281—Public participation— Paragraph (a) further clarifies the "reasonableness" standard implied in the statutory requirement, while paragraph (b) reflects a statutory requirement in the General Education Provisions Act. These changes do not impose any additional costs.

Section 300.300—Child find—The final regulations clarify that the State must ensure child find is fully implemented throughout the State. This clarification does not impose any additional costs. The final regulations also add language to clarify that the services and placement needed by each child with a disability must be based on the child's unique needs and not on the child's disability. This clarification does not impose any costs on school districts.

Section 300.301(c)—Implementation of IEP—The final regulations add language in a new paragraph (d) making it clear that there can be no delay in implementing a child's IEP in any case in which the payment source is being reconciled. This clarification does not impose any additional costs.

Section 300.308—Assistive technology— The final regulations add a provision that clarifies that a public agency must permit a child to have access to a school-purchased assistive technology device at home or in another setting if necessary to ensure FAPE. This change does not impose any additional costs on school districts because it implements a longstanding policy of the Department.

Section 300.309—Extended school year services—The final regulations specify that States may not limit eligibility for extended school year services based on disability and may not limit types and amounts of services; and clarify that States may establish standards such as likelihood of regression for determining eligibility for ESY and that every child is not entitled to receive ESY. These changes in the regulations impose no burden beyond what is required by the statute because they reflect the Department's longstanding policy interpretation of what is required to provide FAPE.

Section 300.312—Charter schools—The final regulations add a new provision that makes clear that children with disabilities who attend charter schools and their parents retain all rights under these regulations. The regulations further explain which entity in the State is responsible for ensuring that the requirements of the regulations are met. These clarifications do not impose any additional burdens on States, schools districts, or charter schools beyond what the statute would otherwise require.

Section 300.313—Developmental delay (DD)—The final regulations add a new provision describing the use of the developmental delay designation. This section sets out the requirements for use of the DD designation. It clarifies that States and LEAs may use the DD designation for any child who has an identifiable disability, provided all the child's identified needs are addressed, and clarifies that States may adopt, if they wish, a common definition of DD for Parts B and C. These changes clarify the flexibility the statute affords States in using the DD designation and, therefore, impose no costs.

Section 300.341—State standards—The final regulations clarify that a child placed by a public agency must receive an education that meets SEA and LEA standards. The cost impact of this change depends largely on the extent to which non-special education personnel in schools in which a public agency is placing children do not meet SEA and LEA standards. Approximately four percent of the six million children expected to be served under IDEA in school year 1998–1999 are expected to be placed in private schools. Because these schools are typically schools for exceptional children, virtually all of the professionals employed by these schools are special education teachers and related services personnel, who must meet SEA and LEA under the prior law, as implemented by the regulations. Paragraph (b) clarifies that each public educational agency is responsible for developing and implementing an IEP for each child it serves or places or refers. This clarification imposes no additional cost on public agencies since it represents a longstanding interpretation of the statute.

Section 300.342(b)—Implementation of IEPs—The final regulations add language requiring that each child's IEP be accessible to the child's teachers and service providers and that each teacher and provider be informed of specific responsibilities related to implementing the IEP and of needed accommodations, modifications, and supports for the child. This regulation is not expected to impose any undue burden on schools. The regulations clarify what is minimally required to promote effective implementation of the IEP requirements and allow schools flexibility in determining how to comply.

Section 300.342(c)—Use of IFSP—Paragraph (c) requires school districts to obtain written informed consent from parents before using an IFSP instead of an IEP, which is based on an explanation of the differences between the two documents. The regulation would impose a cost burden on districts in those States that elect to allow parents to opt for the use of an IFSP instead of an IEP. However, once a form is developed that explains the differences between an IFSP and an IEP, the costs of providing this form to parents and obtaining written consent are most likely minimal, and are justified by the benefits of ensuring that parents understand the role of the IEP in providing access to the general education curriculum.

Section 300.342(d)—Effective date for IEPs—Paragraph (d) provides that all IEPs developed, reviewed, or revised on or after July 1, 1998 must meet the requirements of IDEA, as implemented. This language clarifies the statute and eliminates the burden that would be associated with redoing all IEPs to conform with the new requirements before July 1. The one-time cost of reconvening millions of IEP teams before July 1 would have been substantial.

Section 300.344(c) and (d)—Participants in IEP meetings—The final regulations add a new paragraph (c) clarifying that determinations about the knowledge and expertise of other individuals invited to be on the IEP team are made by the parent or the public agency that invited them. This clarification reduces potential burden by minimizing opportunities for disputes with respect to whether the parent or public agency may invite another individual to participate on the team. A new paragraph (d) has been added to clarify that a public agency may designate another IEP team member as the public agency representative of the IEP team. Permitting an individual to perform dual functions will reduce the cost of conducting IEP meetings for school districts.

Section 300.344(b)—Including the child in the IEP meeting—Paragraph (b) requires the school to invite students to participate in IEP meetings if the meeting will include consideration of transition services needs or transition services. The effect of this provision is to give 14- and 15-year-olds, and in some cases, younger students the opportunity to participate. The existing regulations have required schools to invite students to meetings in which transition services were to be discussed. These would include all students aged 16 years and older, and in some cases, younger students. The law has also given other children, if appropriate, the opportunity to participate in the IEP meeting. Therefore, in some cases, 14- and 15-year-olds may be already participating. The costs of notifying students about a meeting or trying to ensure that the students' interests and preferences are accommodated are more than justified by the benefits of including students in a discussion of their own transition needs, including their planned course of study in secondary school.

Section 300.345(b)—Participants in IEP meeting—The final regulations clarify that the public agency must inform parents of their right and that of the public agency to invite someone to the IEP meeting who has knowledge or special expertise. This additional requirement will impose minimal burden on schools because this information could be included in other notices the schools are already required to provide to parents.

Section 300.345(f)—Copy of the IEP—The final regulations require the public agency to provide parents a copy of the IEP. The cost of this change will depend on the extent to which parents are currently receiving copies. Under current regulations, schools are required to provide a copy to parents who request one. It is reasonable to assume that schools routinely provide a copy to parents who attend the IEP meeting. The cost of providing copies to those parents who would not otherwise receive copies is not likely to be substantial.

Section 300.346(a)(1)—Performance on assessments—The final regulations require the IEP team to consider the child's performance on general State and district-wide assessments, in considering the child's initial or most recent evaluation. This clarification is not likely to impose an additional costs because one can reasonably assume that most IEP teams would consider this information as a matter of course in determining the child's present levels of performance.

Section 300.347—Transition services—The final regulations delete the requirement from the existing regulations that requires a justification for not providing particular transition services. This change eliminates unnecessary paperwork.

Section 300.349—Private school placements—The final regulations incorporate the previous regulatory requirement regarding inviting a representative of the private school to a child's IEP meeting. This requirement does not impose a significant burden, while helping to ensure appropriate implementation of IEPs for children placed in private schools.

Section 300.350—Accountability—The final regulations include a statement regarding the responsibilities of public agencies and teachers to make good faith efforts to ensure that a child achieves the growth projected in the IEP, even though the IEP should not be regarded as a performance contract. This clarification does not impose any additional costs on agencies and is intended to promote proper implementation of the IEP requirements.

Section 300.401—Children placed in private schools—The final regulations specify that a child placed in a private school by a public agency as a means of providing FAPE must receive an education that meets the standards that apply to the SEA and LEA. For example, all personnel who provide educational services must meet the personnel standards that apply to SEA and LEA personnel providing similar services. This change could increase the costs of these placements to the extent this change required private schools to increase their salaries in order to recruit regular education personnel who meet SEA and LEA standards. However, the costs imposed by this change are expected to be minimal. Less than two percent of the six million children served under Part B are placed by public agencies in private schools. These schools are typically special schools in which most of the education personnel are providing special education and related services. These personnel have been required to meet SEA and LEA standards under prior law.

Section 300.403—Reimbursement for private placements—The final regulations include language in paragraph (c) that makes it clear that a private placement must be appropriate to be eligible for reimbursement, but does not need to meet State standards. This clarification, which is based on Supreme Court decisions regarding the basic standard for reimbursement, does not impose any additional costs on State or local agencies.

Section 300.451—Consultation on child find—The final regulations add a new

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paragraph (b) to require public agencies to consult with representatives of parentally-placed private school students on how to conduct child find. Paragraph (a) clarifies that the child find activities for parentally-placed children must be comparable to child find activities for children with disabilities in public schools. The consultation requirement may impose an additional burden but is expected to better enable school districts to carry out this mandatory function. The requirement for comparability does not impose any additional burden, but clarifies the intent of the statute, which does not distinguish between child find activities for children enrolled in public schools and those conducted for children in private schools.

Section 300.452—Services plan—A paragraph has been added that clarifies that a services plan must be implemented for each parentally-placed private child who is receiving services under Part B. This clarification does not impose any additional burden.

Section 300.453—Expenditures on child find in private schools—A new paragraph (b) requires States to conduct a child count of private school children with disabilities and consult with representatives of private school children in deciding how to conduct that count. This count is necessary to enable States to determine how much they are required to spend on providing special education and related services to this population. A new paragraph (c) clarifies that the costs of child find for private school children may not be considered in determining whether the LEA met the requirement for proportionate expenditures on parentally-placed children. This provision does not impose any additional cost on school districts because it has been the Department's longstanding interpretation that child find includes the identification of children in private schools and that the cost of child find for private school children may not be considered in determining whether the LEA has met the requirements to serve children in private schools. Paragraph (d), which clarifies that States and LEAs are not prohibited from spending additional funds on providing special education and related services to parentally-placed children beyond what would be required, does not impose any additional costs. Paragraph (b) requires the LEA to conduct a child count of children with disabilities in private schools on the same day in which the overall count is conducted, to consult with private school representatives on conducting that annual count, and to use that count to determine required expenditures. Although the requirement to conduct the child count on a date certain limits LEA flexibility and the required consultation imposes a burden, both requirements help ensure that the child count accurately reflects the size of the private school population.

Section 300.454—Services to children in private schools—The final regulations clarify that no private school child has an individual right to receive any of the services the child would receive if enrolled in a public school. This section further provides that each LEA shall consult with representatives of private school children in determining which children will receive services, what services will be provided, how and where services would be provided, and how they would be evaluated. The regulations make it clear that the representatives must have a genuine opportunity to express their views and that the consultation must be before the LEA makes its final decisions. The regulations also require the LEA to conduct meetings to develop a services plan for each private school child and to ensure the participation of a representative of the child's private school at the meeting. These regulations help ensure effective implementation of the provisions relating to serving parentally-placed children and impose minimal burden on school districts.

Section 300.455—Services to children in private schools—The final regulations clarify that services provided private school children must be provided by personnel meeting SEA standards; that children in private schools may receive different amounts of services than children in public schools; and that there is no individual entitlement to services; each child to be provided services must have a services plan. These changes do not impose any additional costs on school districts; indeed they reflect the Department's longstanding interpretation of the provisions relating to serving parentally-placed children.

Section 300.456—Treatment of transportation—Consistent with the Department's longstanding interpretation, the final regulations state that transportation must be provided to private school children if necessary to enable them to benefit from the services that are offered. The regulations also clarify that the cost of providing the transportation may be included in calculating whether the LEA has met its financial obligations. The final regulations further clarify that the LEA is not required to provide transportation between the child's home and the private school. These clarifications could reduce the potential cost for school districts of complying with the requirement for proportionate expenditures.

Section 300.457—Complaints of parentally-placed children—The final regulations make it clear that due process procedures do not apply to parentally-placed children. This clarification will reduce costs to the extent that LEAs have allowed parents to use the due process procedures to bring complaints relating to parentally-placed children. This section also clarifies that due process procedures do apply to child find. This change will increase costs to the extent that parents were unaware of their ability to bring complaints about child find and now do so.

Section 300.500(b)(1)(iii)—Parental consent—The final regulations add language to clarify that a revocation of consent does not have retroactive effect if the action consented to has already occurred. This change protects LEAs from complaints regarding services provided in reliance on parental consent that was subsequently revoked. It does not impose any costs on LEAs.

Section 300.501(b)—Parental access to meetings—Paragraph (b) of § 300.501 defines when and how to provide notice to parents of meetings in which they are entitled to participate. It further limits what is meant by the term "meeting." These regulations impose the minimal requirements necessary to implement the statute. The language in paragraph (b)(1) helps to clarify what is required to provide parents with a meaningful opportunity to attend meetings while the language in paragraph (b)(2) is designed to reduce unnecessary burden by clarifying what constitutes a "meeting."

Section 300.501(c)—Placement meetings—Paragraph (c) of § 300.501 specifies that the procedures to be used to meet the new statutory requirement of parental involvement in placement decisions. It provides that the procedures used for parental involvement in IEP meetings also be used for placement meetings. These include specific requirements relating to notice, methods for involving parents in the meeting, and recordkeeping of attempts to ensure their participation. Because in many cases placement decisions will be made as part of IEP meetings, as is already the case in most jurisdictions, the impact of this regulation will be minimal. In those cases in which placement meetings are conducted separately from the IEP meetings, the benefits of making substantial efforts to secure the involvement of parents and provide for their meaningful participation in any meeting to discuss their child's placement more than justify the costs.

Section 300.502—Independent educational evaluation—Paragraph (a) provides that on request for an independent education evaluation (IEE) parents are provided with information about where an IEE may be obtained and the agency criteria applicable to IEEs, criteria that must be consistent with the definition of an IEE. Paragraph (b) makes it clear that if a parent requests an IEE, the agency must either initiate a due process hearing to show that its evaluation is appropriate or provide for an IEE at public expense. The final regulations also provide that a public agency may request an explanation from the parents regarding their concerns when a parent requests an IEE at public expense, but such an explanation may not be required and the public agency may not delay providing the IEE, or initiating a due process hearing. These provisions requiring the agency to provide information to the parents and take action do not result in significant additional costs because if the agency did not take action, parents would be free to request due process to compel action. It is important for parents to be informed about the relevant agency criteria for an IEE since the parent has a right to an IEE at public expense and the IEE must meet agency criteria to be considered by the public agency in determining eligibility.

Paragraph (e) provides that a public agency may not impose conditions or timelines related to obtaining an independent evaluation. This requirement, which arguably limits the flexibility of school districts, is critical to ensuring that school districts do not find ways to circumvent the right provided by the IDEA to parents to obtain an independent evaluation.

Sections 300.504(b)(14)—Notice to parents regarding complaint procedures—The final regulations require that the required

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procedural safeguards notice to parents include information about how to file a complaint under State complaint procedures. Because districts are already required to provide this notice to parents, the additional cost of adding this information will be one-time and minimal. The burden on small districts could be minimized if each SEA were to provide its LEAs with appropriate language describing the State procedures for inclusion in the parental notices. Making parents aware of a low cost and less adversarial mechanism that they can use to resolve disputes with school districts should result in cost savings and more cooperative relationships between parents and districts.

Section 300.505(a)(3)—Parental consent for reevaluation—Paragraph (a)(3) clarifies that the new statutory right of parents to consent to a reevaluation of their child does not require parental-consent prior to the review of existing data or administering a test or other evaluation procedure that is given to all children (unless all parents must consent). As a matter of good practice, school personnel should be engaged in reviewing information about the child's performance on an on-going basis. Requiring parental consent for this activity would have imposed a significant burden on school districts with little discernable benefit to the children served under these regulations.

Paragraph (c)(2) uses the procedures that were in the prior regulations dealing with inviting parents to IEP meetings as a basis for defining what it means to undertake "reasonable measures" in obtaining parental consent. The intent of the change is to meaningfully operationalize the statutory right of parents to consent to a reevaluation of their child. Given the importance of parental involvement in all parts of the process, any burden imposed by the proposed recordkeeping requirements is justified by the benefits of securing parental consent to the reevaluation.

Section 300.506—Impartial mediation—Paragraph (b)(2) specifies that if the mediator is not selected from the list of mediators on a random basis, such as rotation, both parties must be involved in selecting the mediator and agree with the selection of the mediator. Paragraph (c) interprets the statutory requirement that mediation be conducted by an impartial mediator to mean that a mediator may not be an employee of any LEA or a State agency that is providing direct services to the child and must not have a personal or professional conflict of interest. However, a person will not be considered an employee merely for being paid to serve as a mediator. Since participation in mediation is voluntary, it must be viewed as an attractive alternative to both public agencies and parents. Both parties must trust the process and the first test of that is the selection of the mediator. It is unlikely that parents would regard an employee of the other party to the dispute to be impartial or a person who has a personal or professional conflict of interest. Providing for impartiality should help promote the use of mediation and improve its overall effectiveness in resolving disagreements. The impact of disallowing these individuals from serving as mediators is not likely to have a significant impact on States, given current practices. Many States contract with private organizations to conduct their mediations. Others use employees of the State educational agency, which, in most cases, is not the agency providing direct services. Given the significant benefits to children, families, and school districts of expeditiously resolving disagreements without resort to litigation, the benefits of this change easily justify any cost or inconvenience to States.

Section 300.506(d)(2)—Failure to participate in meeting—Paragraph (d)(2) would specify that a parent's failure to participate in a meeting at which a disinterested person explains the benefits of and encourages the use of mediation could not be used as a reason to deny or delay the parent's right to a due process hearing. This change is not likely to limit the benefits to school districts of mediation as it is unlikely that parents who are unwilling to participate in such a meeting with a disinterested person would be willing to engage in the voluntary mediation provided for in the statute.

Section 300.507(c)(4)—Failure to provide notice—Paragraph (c)(4) makes it clear that failure by parents to provide the notice required by the statute cannot be used by a school district to delay or deny the parents' right to due process. This regulation would eliminate the possibility that public agencies will delay a due process hearing pending receipt of a notice that they deem to be acceptable. This regulation does not impose any cost on school districts and would help ensure that parents are afforded appropriate and timely access to due process.

Section 300.510(b)(2)(vi)—Access to findings and decisions—The final regulations give parents the option of selecting an electronic or written copy of the findings and decisions in the administrative appeal of a due process decision. This is consistent with the statutory right of the parents to a written or electronic copy of the decision and findings in the due process hearing. It is important to ensure that parents are provided the decisions and findings in a way that is most useful to them. The cost of implementing this requirement is expected to be negligible.

Section 300.513(b)—Attorneys' fees—Paragraph (b) provides that funds provided under Part B of IDEA could not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of IDEA. This regulation does not increase the burden on school districts or otherwise substantially affect the ability of school districts to pay attorneys' fees that are awarded under IDEA or to pay for their own attorneys. It merely establishes that attorneys' fees must be paid by a source of funding other than Part B based on the Department's position that limited Federal resources not be used for these costs. This regulation is not expected to have a cost impact on small (or large) districts because all districts have non-Federal sources of funding that are significantly greater than the funding provided under IDEA. Currently, funds provided to States under the IDEA represent about ten percent of special education expenditures.

Section 300.514(c)—Hearing officer decisions—The final regulations clarify that if a State hearing officer in a due process hearing or a review official in a State level review agrees with the parents that a change in placement is appropriate, the child's placement must be treated in accordance with that agreement. This regulation is not expected to have a significant cost impact because it is based on the Supreme Court's language in *Burlington School Committee v. Department of Education*, and the decisions of appellate courts in such circuits as the 3rd and 9th. If paragraph (c) were not included in the regulation, in many cases, parents would be expected to be able to successfully argue, as they have in the past, that the hearing officer's decision to change the placement of a child be implemented. The cost impact of this regulation in other circuits and cases in which the placement change would not have occurred is indeterminate because in some cases implementation of the hearing officer's decision will result in moving children to more costly placements and, in other cases, to less costly placements. In either case, the benefits to the child of securing an appropriate placement justify any potential increase in costs or other burdens to the school district.

Section 300.519—Change in placement—The final regulations define a change in placement in the context of disciplinary removals as a removal for more than 10 consecutive school days or a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year and, because of such factors as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. This change does not impose any additional costs. It is consistent with longstanding interpretations of the law.

Section 300.520(a)—Authority of School Personnel—Paragraph (a) clarifies that school personnel may remove a child with a disability for school code violations for up to 10 days at a time more than once during a school year, as long as such removals do not constitute a change in placement. This clarification does not result in any additional costs or savings for school districts because it is consistent with the Department's longstanding interpretation of the law and the statute, as amended.

Section 300.520(b) and (c)—Behavioral interventions—Paragraph (b) of this section makes it clear that if a child is removed from his or her current placement for 10 schools days or fewer in a given year, the school is not required to convene the IEP team to develop an assessment plan for the child. Paragraph (b) further provides that a school would be required to do so if the child were suspended for more than 10 days in a given school year. Paragraph (b) specifies that the IEP team meeting to consider behavioral interventions occur within 10 business days of the behavior that leads to discipline rather than 10 calendar days, and clarifies that, if the child does not have a behavior intervention plan, the purpose of the meeting is to develop an assessment plan. After completing the assessments specified in the plan, the team must meet to develop appropriate behavioral interventions to address that behavior. Because the statute could be read to require that the IEP team be convened for this purpose the first time a child is suspended in a given year, the requirement in the final regulations would significantly reduce the burden on school districts.

The business day alternative would further minimize the burden on school districts and would not have a significant impact on children with disabilities, in light of other protections for children.

In determining whether to regulate on this issue, the Secretary considered the potential benefits of providing behavioral interventions to children who need them and the impact on school districts of convening the IEP team to develop behavioral interventions if children are suspended.

Based on consideration of the costs and benefits to children and schools, the IEP team should not be required to meet and develop or review behavioral interventions for a child unless the child was engaged in repeated or significant misconduct. The costs and burden of convening the team the first time a child is suspended outweigh any potential benefits to the child if the child is receiving a short-term suspension for an infraction. At the same time, the benefits of requiring a plan for a child who has already been suspended for more than 10 days justify the costs given the benefits of early intervention to both students and schools.

The final regulations further provide that in the case of a subsequent suspension of less than 10 days that does not constitute a change in placement for a child who has a behavioral intervention plan, a meeting would not be required to review the behavioral intervention plan unless one or more team members believe that the child's IEP or its implementation need modification. Since the statute could be read to require that the IEP team meet to review the child's plan each time the child is suspended, this language further reduces the cost to school districts.

Section 300.521—Due process hearing for removal—The final regulations specify that a hearing officer is to make the determination authorized by section 615(k)(2) of IDEA (regarding whether a child's current educational placement is substantially likely to result in injury to self or others) in a due process hearing.

A hearing that meets the requirement for a due process hearing is the most appropriate forum for expeditiously and fairly determining whether the district has demonstrated by substantial evidence (defined by statute as "beyond a preponderance of the evidence") that maintaining the current placement is substantially likely to result in injury and to consider the appropriateness of the child's current placement and the efforts of the district to minimize the risk of harm.

The cost impact of this regulation on school districts will be limited because in cases in which school districts and parents agree about the proposed removal of a dangerous child, no hearing is necessary. In those few cases in which there is disagreement, the benefits of conducting a due process hearing justify the costs.

Section 300.523—Manifestation determination—Paragraph (a) makes it clear that a school is required to conduct a manifestation review only when the removal constitutes a change in placement.

As was the case in considering section 300.520(c), the Department considered the potential benefits to the child and impact on districts of convening the IEP team.

The conclusion was that the IEP team should not be required to meet and determine whether the child's behavior was a manifestation of the disability unless the district is proposing a suspension of more than 10 days at a time or a suspension that constitutes a pattern of exclusion. The cost of convening the team to conduct a manifestation review outweigh the potential benefits to a child being suspended for a few days, particularly because the statute clearly allows the school a period of ten days after the misconduct occurs to convene the team for purposes of conducting the manifestation determination. In the case of short term suspensions, the team would often be meeting after the child had already returned to school.

The primary purpose of this review is to ensure that a child will not be punished for behavior that is related to his or her disability. The team is required to consider, for example, whether the child's disability has impaired his or her ability to understand the impact and consequences of his or her behavior and whether the child's disability has impaired the child's ability to control the behavior subject to discipline. Conducting this review is of little use after the child has returned to school. A review would have limited applicability to future actions. Even in those cases in which the child engaged in identical misconduct, one's assessment of the relationship between the child's behavior and disability could change. Moreover, the statute clearly contemplates an individualized assessment of the conduct at issue. Once a child has been suspended for more than 10 days in a given year, the team will already be considering the need for changes in the child's behavior intervention plan, if the child has one, or will be meeting to develop one, if the child does not. Requiring an additional meeting to examine the relationship between the child's behavior and disability is unlikely to produce additional information that would inform the development of appropriate behavioral strategies. Requiring the behavioral assessment to be conducted once a child has been suspended for 10 days in a school day will help ensure that the district responds appropriately to the child's behavior.

This regulation would significantly reduce costs for school districts if the statute is read to require a manifestation review every time a child is suspended.

Section 300.523(f)—Manifestation determination—The final regulations clarify that if the team identifies deficiencies in the child's IEP, its implementation, or placement, the agency must take immediate steps to remedy the deficiencies. This clarification does not impose any costs beyond what the statute would require.

Section 300.526—Placement in alternative setting—Language is added to paragraph (c) to make clear that a school district may request a hearing officer to extend a 45-day placement on the grounds that returning a child to his or her regular placement would be dangerous. This change, which increases the options available to school districts for dealing with a child engaged in dangerous behavior, does not impose any costs on school districts.

Section 300.527—Basis of knowledge—The final regulations make a number of clarifying changes: Language is added to paragraph (b)(2) to clarify that the behavior or performance must be in relation to one of the disability categories. Paragraph (b)(4) has been revised to require that expressions of concern about the child be made to personnel who have responsibility for child find or special education referrals. A new paragraph has been added to clarify that if an agency acts and determines that the child is not eligible, and provides proper notice to the parents, and there are no additional bases of knowledge that were not considered, the agency would not be held to have a basis of knowledge. These changes reduce costs for LEAs by further specifying what is required for determining that an LEA has a basis for knowledge that a child is a child with a disability. By specifying, for example, that expressions of concern be made to personnel responsible for child find or special education referral eliminates the possible interpretation that a school must provide services and other protections to children who were the subject of conversation between any two people in the school. Without these clarifications, commenters have suggested that potentially all children could avail themselves of IDEA protections.

Roughly three million nondisabled children are expected to be the subject of disciplinary actions during this school year. Parents are likely to raise this issue in the case of long-term suspensions and expulsions in which identification as a child with a disability ensures the non-cessation of educational services, among other protections. An estimated 300,000 nondisabled children receive long-term suspensions or expulsions in a given school year. Based on the public comments on this section of the regulations, it would appear that a basis for knowledge claim could be sustained in a significant percentage of these cases. Assuming for purposes of this analysis that it could be sustained in about 10 percent of cases, the costs of providing services, for example, to those children during the period in which they are excluded from school would be considerable because only a minority of States currently provide services to children without disabilities who have been disciplined. Therefore, the savings resulting from these clarifications are considerable.

Section 300.528—Expedited due process hearings—The final regulations specify that States establish a timeline for expedited due process hearings that meets certain standards. These include: ensuring written decisions are mailed to the parties in less than 45 days, with no extensions that result in a decision more than 45 days from the request for the hearing, and providing for the same timeline whether the hearing is requested by a public agency or parent. Paragraph (b) further clarifies that the State may alter other State-imposed procedural rules from those it uses for other hearings. These clarifications provide States with maximum flexibility in conducting these hearings while ensuring equitable treatment for parents and public agencies. Requiring such hearings within 45 days imposes minimal burden on States since 45 days provides ample time—more time than proposed by many of the commenters—and the requests for such hearings are not expected to be great. Requests for expedited hearings will only be made in those cases involving serious misconduct in which there is a disagreement between the parents and public agency regarding action proposed by the public agency.

Section 300.529—Transmittal of education records—The final regulations clarify that a child's special education and disciplinary records may only be transmitted to the extent that such transmission is permitted under the Family Educational Rights and Privacy Act (FERPA). This clarification, which restricts the extent to which such records may be transmitted to certain agencies, consistent with the requirements of FERPA, does not impose any burden on school districts.

Section 300.532—Evaluation procedures—The final regulations require that assessments of children with limited English proficiency must be selected and administered to ensure that they measure the extent to which a child has a disability and needs special education, and do not instead measure the child's English language skills. This change, which clarifies requirements under both IDEA and Title VI, does not impose any additional burden. The final regulations also add language requiring that if an assessment is not conducted under standard conditions, information about the extent to which the assessment varied from standard conditions, such as the qualifications of the person administering the test or the method of test administration, must be included in the evaluation report. This change will impose a burden on school districts only to the extent that the evaluation team does not currently include information in its report on the extent to which an assessment varied from standard conditions. Information about the qualifications of the person administering the test and the method of test administration is needed so that the team of qualified professionals can evaluate the effects of variances in such areas on the validity and reliability of the reported information. The final regulations clarify that in evaluating a child all needs of the child must be identified, including any commonly linked to a disability other than the child's. This change does not impose any additional burden on districts, but clarifies what is intended by the term "comprehensive".

Section 300.533(b)—Review of existing data—The final regulations make it clear that the group that is responsible for reviewing existing data on the child as part of an initial evaluation or a reevaluation need not meet to conduct this review. This clarification reduces costs for school districts by eliminating unnecessary meetings of this group.

Section 300.534(b)—Eligibility determination—Paragraph (b) clarifies that children are not eligible if they need specialized instruction because of limited English proficiency or lack of instruction in reading or math, but do not need specialized instruction because of a disability. This clarification does not impose any costs on school districts, but reflects the statutory intent.

Section 300.534(c)—Termination of eligibility—Paragraph (c) clarifies that an evaluation is not required before the termination of a student's eligibility under Part B due to graduation with a regular high school diploma or aging out under State law. This clarification reduces the costs for school districts by eliminating the need to conduct evaluations for the 146,000 students who are expected to exit high school in school year 1998–1999 by graduating or aging out.

Section 300.535(a)(1)—Eligibility determination procedures—The final regulations add parents to the variety of sources from which the public agency will draw in interpreting evaluation data for the purpose of determining if the child is a child with a disability. This change imposes minimal burden while providing for meaningful parental involvement, consistent with the requirements for including parents in the team that determines eligibility.

Section 300.552(e)—Placement in regular classroom—The final regulations provide that a child may not be denied placement in an age-appropriate regular classroom solely because the child's education requires modification to the general curriculum. This change clarifies the requirement in the law that a child may only be removed from the regular educational environment if education in the regular class cannot be achieved satisfactorily with the use of supplementary aids and services. Although this clarification may result in an increase in the number of children served in regular classes, it does not impose costs on school districts beyond what the statute itself would require because of the longstanding requirement to serve children in the least restrictive environment.

Section 300.562—Access to records—The final regulations make clear that agencies must comply with requests for access to records by parents prior to any meetings, but no more than 45 days after request, consistent with FERPA. This provision minimizes burden on LEAs by not imposing a shorter deadline than provided by FERPA, except as necessary to provide access before an IEP meeting or hearing. This provision helps ensure that parents have the ability to adequately prepare for and participate in IEP meetings and due process hearings, which are crucial to ensuring each child's right to a free appropriate public education.

Section 300.571—Consent for disclosure of information—The final regulations provide for an exception to the requirement for parental consent for disclosure of education records, consistent with the language in § 300.529. This does not impose any costs on school districts and resolves an apparent contradiction in the regulations with respect to disclosure of education records to law enforcement and juvenile justice agencies.

Section 300.574—Children's rights relating to records—The final regulations clarify that the parents' rights under FERPA transfer to the student at age 18. The regulations further provide that if the rights of parents under Part B of IDEA are transferred to the student at the age of majority, then the rights of parents regarding education records also transfer. This clarification does not impose any additional costs on school districts.

Section 300.581-300.587—Procedures for enforcement—The final regulations clarify the types of notice and hearing that the Department would provide before taking an enforcement action under Part B of IDEA. Providing clarity about the applicable procedures for the various types of enforcement actions will benefit potential subjects of enforcement actions and the Department by ensuring that time and resources are not spent on unnecessary disputes about procedures or needless process.

Section 300.589—Waiver procedures—The final regulations describe the procedures to be used by the Secretary in considering a request from an SEA of a waiver of the supplement, not supplant and maintenance of effort requirements in the IDEA Amendments of 1997. This regulation does not impose any cost on local school districts. The procedures will only affect a State requesting a waiver under Part B.

Section 300.624—Capacity-building subgrants—The final regulations make it clear that States can establish priorities in awarding these subgrants. The language provides permissive authority to be used at the discretion of each State, clarifying the intent of the statutory change and imposing no burden on State agencies. Allowing States to use these funds to foster State-specific improvements should lead to improving educational results for children with disabilities.

Section 300.652—Advisory panel functions—The final regulations add language stating that the panel's responsibilities include advising on the education of students with disabilities who have been incarcerated in adult prisons. This additional burden will not impose significant costs.

Section 300.653—Advisory panel procedures—The final regulations include language in paragraph (d) to require panel meetings to be announced long enough in advance to afford people a reasonable opportunity to attend and require that agenda items be announced in advance and that meetings be open. These changes impose minimal burden while facilitating meaningful participation in the meetings.

Sections 300.660(a) and 303.510(a)—Information about State complaint procedures—The final regulations require States to widely disseminate their complaint procedures. While this proposed requirement would increase costs for those State educational agencies that have not established procedures for widely disseminating this information, the Secretary could have prescribed specific mechanisms for this dissemination but chooses not to, in order to give SEAs flexibility in determining how to accomplish this. The requirement would not have any direct impact on small districts and would benefit parents who believe that a public agency is violating a requirement of these regulations, by providing them the information they would need to get an official resolution of their issue without having to resort to a more formal, and generally more costly, dispute resolution mechanism.

Section 300.660(b) and 303.510(b)—Remedies—The final regulations require States in resolving complaints to address how to remedy the failure to provide appropriate services, including awarding of compensatory relief and corrective action. This clarification does not impose any additional costs beyond those that would be otherwise required by the statute.

Section 300.661(c) and 303.512(c)—Requirements for complaint procedures—The final regulations add language that clarifies how the State complaint process interacts with the due process hearing process. The language clarifies that a State may set aside any part of a complaint being addressed in a due process hearing; that the due process hearing decision is binding; and that failure to implement a due process decision must be addressed by the SEA. This clarification is expected to reduce costs by reducing unnecessary disputes about the relationship between the two processes.

Sections 300.661 and 303.512—Secretarial review—The final regulations delete the provision providing for Secretarial review of complaints filed under State complaint procedures. The effect of this change on small (and large) districts would be inconsequential because of the small number of requests for these reviews. This was done in recognition of the report of the Department's Inspector General of August 1997, that noted that this procedure provides very limited benefits to children with disabilities or to IDEA programs and involves a considerable expenditure of the resources of the Office of Special Education Programs and other offices of the Department. The Inspector General's report concluded that greater benefit to the programs and individuals covered by IDEA would be achieved if the Department eliminated the Secretarial review process and focused on improving State procedures for resolving complaints and implementing IDEA programs. This change, and the changes in §§ 300.660(b), 300.503(b)(8), 303.510(b), and 303.403(b)(4) that require greater public notice about the State complaint procedures, would implement those recommendations.

Sections 300.662 and 303.511—State reviews—This change relieves States of the requirement to review complaints about violations that occurred more than three years before the complaint. This limitation on the age of the complaints is expected to reduce the cost to SEAs of investigating and reviewing complaints. There is no reason to believe this change would adversely affect small districts. There is also no reason to expect that this proposal would have a significant negative impact on individuals or entities submitting complaints under these procedures as it is unlikely that complaints alleging a violation that occurred more than three years in the past and that do not allege a continuing violation or request compensatory services would result in an outcome that puts the protected individuals under these regulations in a better position than they would have been in if no complaint had been filed. On the other hand, allowing States to focus their complaint resolution procedures on issues that are relevant to the current operation of the State's special education program may serve to improve services for these children.

Section 300.712—Allocations to LEAs—The final regulations clarify how to calculate the base payments to LEAs under the permanent formula in a case in which LEAs have been created, combined, or otherwise reconfigured. Although recalculation itself imposes some burden on the SEA, the regulations provide the SEA with considerable flexibility in doing that recalculation. For example, the SEA determines which LEAs have been affected by the creation, combination, or reconfiguration and what child count data to use in allocating the funds among the affected LEAs.

Language has also been added to the regulations that in implementing the permanent formula States must apply, on a uniform basis, the best data available to them. This clarification does not impose any additional burden on States in allocating funds.

Section 300.753—Annual child count—The final regulations clarify that the SEA may count parentally-placed private school children if a public agency is providing special education or related services that meet State standards to these children. This clarification does not impose any burden on SEAs or LEAs while helping to ensure a more equitable distribution of IDEA funds.

ATTACHMENT 3.—DISPOSITION OF NPRM NOTES IN FINAL PART 300 AND 303 REGULATIONS[1]

[Note: Attachment 3 will not be codified in the Code of Federal Regulations]

I. List of notes by section in NPRM	II. Disposition of notes in final regulations
Subpart A	
300.1—*Purposes:*	
• Independent living	• In discussion under § 300.1; and in Appendix A (Re-transition services).
300.2—*Applicability to State, local, and private agencies:*	
• Requirements are binding on each public agency regardless of whether it receives B funds.	• Added to Reg as § 300.2(a)(2).
Definitions Used in This Part	
1. List of terms defined in specific sections	1. Moved to Index under "Definitions."
2. Abbreviations used	2. Terms identified in Reg text.
300.6—*Assistive technology service:*	
• Definitions of assistive technology device and service are identical to Technology Act of 1988.	• Deleted.
300.7—*Child with a disability:*	
1. Autism characteristics after age 3 is still Autism	1. Added to Reg as § 300.7(c)(1)(ii).
2. Developmental Delay—Explanation	2. Added to Reg at § 300.7(b)(2).
3. Dev. Delay—H.Rpt statement on importance of	3. In discussion under § 300.7(b).
4. Emotional disturbance (ED)—H.Rpt statement	4. In discussion under § 300.7(c).
5. ADD/ADHD—Eligible under OHI or other disability category if meet criteria under § 300.7(a).	5. "ADD/ADHD" and "limited alertness" added to § 300.7(c)(9).
300.12—*General curriculum:*	
• Term relates to content and not setting	• Added to Reg (IEP—§ 300.347(a)(1)(i), (2)(i)). In discussion of "Gen. Cur."
300.15—*IEP Team:*	
• IEP team may also serve as placement team	• In discussion under § 300.16.
300.17—*LEA:*	
• Charter school that meets def of "LEA" is eligible for B-$; & must comply w/B if it receives B-$.	• Added to Reg as part of § 300.312.
300.18—*Native language:*	
• (1) Sections where term is used	• (1) Listed in Index.

ATTACHMENT 3.—DISPOSITION OF NPRM NOTES IN FINAL PART 300 AND 303 REGULATIONS [1]—Continued

[Note: Attachment 3 will not be codified in the Code of Federal Regulations]

I. List of notes by section in NPRM	II. Disposition of notes in final regulations
(2) Exceptions to definition	(2) Added to Reg at § 300.19. In discussion under § 300.19.
300.19—*Parent:*	
• "Parent" includes a grandparent or stepparent, etc	• Added to Reg at § 300.20(a)(3).
300.22—*Related services:*	
1. All related services may not be required	1. In discussion under § 300.24.
2. H. Rpt. on O/M services and travel training	2. In discussion under § 300.24. —Travel training added as § 300.26(a)(2)(ii) and (b)(4).
3. Use of paraprofessionals if consistent w/.136	3. In discussion under §§ 300.24; 300.136.
4. Transportation—same as nondisabled; accommodations	4. Added to Q–33 in Appendix A.
300.24—*Special education:*	
• A child must need special education to be eligible under Part B of the Act	• Added to Reg as § 300.(7)(a)(2); In discussion under § 300.26.
300.27—*Transition services:*	
• May be special education or related services.. List under § 300.27(c) is not exhaustive	• Added to Reg as § 300.29(b). In discussion under § 300.29.
Subpart B	
300.121—*Free appropriate public education:*	
1. FAPE obligation begins on 3rd birthday	1. Added to Reg as § 300.121(c).
2. Re-child progressing from grade to grade	2. Added to Reg as §§ 300.121(e), 300.125(a)(2)(ii), and § 300.300(d).
300.122—*Exception to FAPE for certain ages:*	
1. FAPE and graduation	1. "Prior notice" added to Reg as § 300.122(a)(3)(iii). —A new § 300.534(c)(2) states that evaluation is *not* required for graduation with a regular diploma.
2. H.Rpt. Re-students with disabilities in adult prisons	2. Added as § 300.122(a)(2)(ii).
300.125—*Child find:*	
1. Collection of data subject to confidentiality	1. Added to Reg as § 300.125(e).
2. Services must be based on unique needs	2. Added to Reg as § 300.300(a)(3).
3. Child find under Parts B and C	3. Added to Reg as § 300.125(c).
4. Extend child find to highly mobile children	4. Added to Reg as § 300.125(a)(2)(i).
300.127—*Confidentiality of * * * information:*	
• Reference to FERPA	• Deleted. (Already covered under 300.560–300.576.)
300.130—*Least restrictive environment:*	
• H. Rpt. statement Re-continuum	• Added to Reg at § 300.130(a).
300.135—*Comprehensive system of personnel development:*	
• H.Rpt—Disseminate information on Ed research * * * States able to use info—(a)(2) Re—SIP.	• In discussion under § 300.135.
300.136—*Personnel standards:*	
1. Regs require States to use own highest requirements. Defs not limited to traditional categories.	1. Added to Reg as § 300.136(b)(2).
2. State may require * * * good faith effort * * * shortages	Added to Reg as § 300.136(g)(2).
3. If State only 1 entry-level degree, modification of standard to ensure FAPE won't violate (b)/(c).	3. Added to Reg as § 300.136(b)(4).
300.138—*Participation in assessments:*	
• Only small no. children need alternate assmts	• In discussion under § 300.138.
300.139—*Reports relating to assessments:*	
• Re aggregate data ((b)), PA may also Rpt data other ways (e.g.,.. trendline * * *)	• In discussion under § 300.139.
300.142—*Methods of ensuring services:*	
1. H.Rpt—Import. of ensuring services Re E/non-ed agencies* * *Medicaid	1. Added to Reg at § 300.142(b)(1)(ii).
2. Intent of (e) = services @ no cost-parents	2. In discussion under § 300.142.
3. Pub Agency can pay certain pvt insur costs for parents	3. Added to Reg at § 300.142(g).
4. If PA receives $ from insurers to return the $	4. Added to Reg at § 300.142(h)(2).
300.152—*Prohibition against commingling:*	
• Assurance is satisfied by sep accounting system.	• Added to Reg as § 300.152(b).
300.185—*Meeting the excess cost requirement:*	
• LEA must spend certain minimum amount * * * Excess costs = costs of special ed that exceed minimum.	• In discussion under § 300.185.
300.232—*Exception to maintenance of effort:*	
• H.Rpt—Voluntary departure Re—personnel paid at/ near top—scale; guidelines to invoke exception.	• Added to Reg as § 300.232(a)(2).
300.234—*Schoolwide programs:*	
• Although funds may be combined, disabled children must still receive services re-IEP	• Added to Reg at § 300.234(c).
200.241—*Treatment of charter schools:*	

ATTACHMENT 3.—DISPOSITION OF NPRM NOTES IN FINAL PART 300 AND 303 REGULATIONS [1]—Continued

[Note: Attachment 3 will not be codified in the Code of Federal Regulations]

I. List of notes by section in NPRM	II. Disposition of notes in final regulations
• B-Regs that apply to pub schools also apply to charter schools; H.Rpt—Expect full compliance.	• In discussion under § 300.241.
Subpart C	
300.300—*Provision of FAPE:*	
1. FAPE Requirement applies to disabled children in school and those with less severe disabilities.	1. In discussion under § 300.300.
2. State must ensure child find fully implemented	2. Added to Reg at § 300.300(a)(2).
3. Why age range—child find is greater than FAPE	3. In discussion under § 300.300.
300.302—*Residential placement:*	
• Requirement applies to placements in St. schools	• In discussion under § 300.302.
300.303—*Proper functioning of hearing aids:*	
• Statement from H. Rpt. on 1978 appropriation bill related to status of hearing aids	• In discussion under § 300.303.
300.304—*Full educational opportunity goal:*	
• S.Rpt (1975) on arts—Brooklyn Museum:	• In discussion under § 300.304.
300.305—*Program options:*	
• List not exhaustive	• In discussion under § 300.305.
300.307—*Physical education:*	
• H.Rpt (142)—Must assure PE available to all HC	• In discussion under § 300.307.
300.309—*Extended school year services:*	
1. LEA may not limit to particular categories or duration. All disabled children not entitled	1. Added to Reg at § 300.309(a)(3).
2. States may establish standards * * * Factors may consider = likelihood of regression	2. In discussion under § 300.309.
300.341—*SEA Responsibility (Re—IEPs):*	
• Section applies-all public agencies, including other State agencies	• Added to Reg as § 300.341(b).
300.342—*When IEPs must be in effect:*	
1. It is expected that IEPs will be implemented immediately after the meeting (with exceptions).	1. In discussion under § 300.342.
2. Requirements—incarcerated youth apply 6–4–97	2. Deleted.
3. IEP vs IFSP—written informed consent	3. In discussion under § 300.342(c).
300.343—*IEP meetings:*	
• Offer of services within 60 days—consent	• In discussion under § 300.343.
300.344—*IEP Team:*	
• Reg Ed teacher at IEP meeting = one who works with the child; if more than one—designate.	• In discussion under § 300.344
300.345—*Parent participation:*	
• Parent notice Re—bring others..procedure used = agency discretion * * * But keep record of efforts.	• Added to Reg as § 300.345(b).
300.346—*Development; review, & revision of IEP:*	
1. Importance Re—Consideration of special factors	1. In discussion under § 300.346.
2. Re—"Deaf Students Educational Services" (1992)	2. In discussion under § 300.346.
3. IEP team and LEP students	3. In discussion under § 300.346.
300.347—*Content of IEP:*	
1. Import of transition services for students below 16	1. In discussion under § 300.347.
2. H.Rpt Re—import of general curriculum	2. In discussion under § 300.347.
3. H.Rpt—Gen Curriculum—length of IEP vs adjustments	3. In discussion under § 300.347.
4. H.Rpt—Teaching methods not in IEP	4. In discussion under § 300.347.
5. Reports to parents on Annual Goals vs Reg. Reports	5. In discussion under § 300.347.
6. H.Rpt—transition service needs vs services	6. In discussion under § 300.347.
7. OK for transition-needs/services below 14 and 16	7. In discussion under § 300.347.
300.350—*IEP—accountability:*	
• Public agency must make good faith effort; parents have right to complain	• Added to Reg as § 300.350(b).
300.360—*Use of LEA allocation for direct services:*	
• If LEA doesn't apply for Pt. B funds, SEA must use in LEA	• Added to Reg at § 300.360(b).
Subpart D	
300.453—*Expenditures:*	
• LEAs may provide services beyond those required	• Added to Reg at § 300.453(d).
300.456—*Location of services:*	
1. Zobrest—Re on-site services	1. In discussion under § 300.456.
2. Transportation to from site * * * not from home	2. Added to Reg at § 300.456(b)(1).
Subpart E	
300.500—*Gen. Resp. of public agencies; definitions:*	
• Parent consent, if revoked is not retroactive	• Added to Reg at § 300.500(b)(1)(iii).
300.502—*Independent educational evaluation:*	
1. Parent not required to specify areas of disagreement	1. Added to Reg at § 300.501(b).
2. Pub agencies—should make info on IEEs widely available; may not require parent-evals meet all criteria.	2. Added to Reg at § 300.502(a)(2).

ATTACHMENT 3.—DISPOSITION OF NPRM NOTES IN FINAL PART 300 AND 303 REGULATIONS [1]—Continued

[Note: Attachment 3 will not be codified in the Code of Federal Regulations]

I. List of notes by section in NPRM	II. Disposition of notes in final regulations
300.505—*Parental consent:*	
1. Pub. agency may use due process to override refusal, unless doing so—inconsistent w/ St law.	1. In discussion under § 300.503.
2. PA must provide servs in any area not in dispute; if nec—FAPE—use override; may recons proposal.	2. In discussion under § 300.503.
3. If parents refuse-reeval needed for servs, & St law prevnts override-reeval, PA may cease servs.	3. In discussion under § 300.503.
300.506 *Mediation:*	
1. H. Rep—If mediator not selected randomly Pub. agency and parents both must select ...	1. Added to Reg at § 300.506(b)(2)(ii).
2. H. Rep—Preserve parental access Rts—FERPA; confidentiality pledge	2. In discussion under § 300.506.
300.507—*Impartial due process hearing; parent notice; disclosure:*	
1. Determination of whether hearing request is based on new info must be made by HO ...	1. In discussion under § 300.507.
2. H. Rep. Re—Attorneys' fees; and the value of the parent notice requirement	2. In discussion under § 300.507.
300.510—*Finality of decision; appeal; impartial review:*	
1. SEA may conduct review directly or thru another agency; but remains response for final decision.	1. In discussion under § 300.510.
2. All parties have right to counsel; if Rev Officer holds a hearing, other rights in 300.509 apply.	2. In discussion under § 300.510.
300.513—*Attorneys' fees:*	
• A State may enact a law permitting HOs to award fees	• In discussion under § 300.513.
300.514—*Child's status during proceedings:*	
• Public agency may use normal procedures for dealing with children who are endangering themselves or others.	• In discussion under § 300.514.
300.520—*Authority of School personnel:*	
1. Removal for 10 days or less—not a chg in placmt; a series of removals that total +10 days may be.	1. In discussion under § 300.520.
2. PA need not conduct review in (b), but encouraged Ck if—serves in accord w/IEP..or addressed.	2. In discussion under § 300.520.
300.523—*Manifestation determination review:*	
1. H.Rpt—Ex of manifestation vs not * * * But not intended— base finding on tech violation-IEP.	1. In discussion under § 300.523.
2. If manifestation—LEA must correct any deficiencies found	2. Added to Reg at § 300.523(f).
300.524—*Determination that behavior not a manifestation of disability:*	
• During pendency—child remains in current placmt or placmt under 300.526, whichever applies.	• In discussion under § 300.524.
300.526—*Placement during appeals:*	
• An LEA may seek subsequent expedited hearings if child still dangerous & issue not resolved.	• Added to Reg as § 300.526(c)(4).
300.532—*Evaluation procedures:*	
1. Re LEP—accurate assmt of child's lang proficency	1. In discussion under § 300.532.
2. If no one at sch Re-LEP, contact LEAs, IHEs	2. In discussion under § 300.532.
3. If assmt not done under standard conditions, include in eval Rpt. Info needed by team ..	3. Added to Reg as § 300.532(a)(2).
300.533—*Determination of needed evaluation data:*	
• Purpose of review by a group; composition of team will vary depending on nature or disability.	• In discussion under § 300.533.
300.535—*Procedures for determining eligibility and placement:*	
• All eval sources not required for each child	• In discussion under § 300.535.
300.551—*Continuum of alternative placements:*	
• Home instruction usually only for limited No. children (medically fragile)	• In discussion under § 300.551.
300.552—*Placements:*	
1. Group in (a)(1) could also be IEP team—if .344	1. In discussion under § 300.552.
2. Main rule in LRE = indiv decisions + alternate placmts; applicability to preschool children.	2. Added to Reg at § 300.552.
3. If IEP team considers-provides for behavioral interventions * * * many disruptive children-Reg cl.	3. In discussion under § 300.552.
300.553—*Nonacademic settings:*	
• Section taken from 504 Regs	• In discussion under § 300.553.
300.554—*Children in public or private institutions:*	
• LRE provisions apply to Children in public and private institutions	• In discussion under § 300.554.
300.573—*Destruction of information:*	
• Info may be kept forever unless parents reject; (Why records are important * * *)	• In discussion under § 300.573.
300.574—*Children's rights:*	
1. Under FERPA Regs, Rts transfer at age 18	1. Added to Reg at § 300.574(b).
2. If Rts transfer re-.517, Rts re Ed-records also transfer; but public agency must give 615 notice to parents and student.	2. Added to Reg at § 300.574(c).
300.587—*Enforcement:*	
• Other enforcement actions include cease and desist order * * * and a compliance agreement.	• In discussion under § 300.587.

ATTACHMENT 3.—DISPOSITION OF NPRM NOTES IN FINAL PART 300 AND 303 REGULATIONS [1]—Continued

[Note: Attachment 3 will not be codified in the Code of Federal Regulations]

I. List of notes by section in NPRM	II. Disposition of notes in final regulations
Subpart F	
300.600—*Responsibility for all educational programs:*	
• Provision = Congressional desire—central point of contact. S.Rpt (1975) * * * Options	• In discussion under § 300.600.
300.623—*Amount required for subgrants to LEAs':*	
• Amt. required for subgrants will vary—yr-to-yr. $ for subgrants 1 yr become flow-thru in next.	• In discussion under § 300.623.
300.624—*State discretion in awarding subgrants:*	
• Purpose of subgrants to LEAs—to provide $ SEA can direct Re needs—can't address Re-formula-$.	• In discussion under § 300.624.
300.650—*Establishment of Advisory panels:*	
• Panel must advise on students in Adult prisons	• Added to Reg at § 300.652(b).
300.660—*Adoption of State complaint procedures:*	
• SEA may award compensory damages Re-denial of FAPE	• Added to Reg at § 300.660(b).
300.661—*Minimum State complaint procedures:*	
1. If complaint also subject of a hearing, must set aside any part addressed-hearing; but resolve the rest.	1. Added to Reg at § 300.661(c)(1).
2. If issue in complaint already decided in a hearing (same parties), H-decision = binding	2. Added to Reg at § 300.661(c)(2).
300.662—*Filing a complaint:*	
• SEA must resolve complaint, even if it is filed by indiv-organization in another State	• Added to Reg at § 300.662(a).
Subpart G	
300.712—*Allocations to LEAs:*	
• Re-85%—use best data available; new data not needed-pvt schs. Re-15%—use best (Examples).	• Added to Reg at § 300.712.
300.750—*Annual report of children served-report requirement:*	
• Report—solely for allocation purposes; count may differ from children who receive FAPE	• In discussion under § 300.750.
300.753—*Annual report of children served-criteria for counting children:*	
1. State may count children in Head Start if Sp Ed	1. Covered by reg. note deleted.
2. Criteria related to counting children in private schools and certain Indian children	2. Covered by reg. note deleted.
300.754—*Annual report of children served-other responsibilities of SEA:*	
• Data are not to go to Secretary in personally identifiable form	• In discussion under § 300.754.
Part 303	
303.19—*Parent:*	
• Definition: examples of grandparent, stepparent	• Added to Reg in § 303.19(a)(3).
303.510—*Adopting Complaint Procedures:*	
1. Complaints can be against any public agency or private provider; these procedures are in addition to other rights.	1. Public/private added to Reg in § 303.510(a)(1); "other rights" in discussion under § 303.512.
2. Compensatory services possible	2. Added to Reg in § 303.510(b).
303.511—*An organization or individual may file a complaint:*	
• Complaints from out-of-state OK	• Added to Reg in § 303.510(a)(1).
303.512—*Minimum State complaint procedures:*	
1. Same issues in complaint and due process hearing	1. Added to Reg in § 303.512(c)(1).
2. Issues previously decided in due process hearing	2. Added to Reg in § 303.512(c)(2).
303.520—*Policies related to payment for services:*	
1. Use of private insurance must be voluntary	1. Deleted.
2. State can use Part C funds to pay insurance costs	2. Deleted.
3. Insurance reimbursements not treated as program income; spending Federal reimbursements doesn't violate nonsupplanting rule.	3. "Program income" added to discussion under § 303.512; "nonsupplanting" added to Reg in § 303.512(d)(2).

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[1] All notes have been removed as notes from the regulations. The substance of certain notes has been added to the text of the regulation, or included in the Notice of Interpretation on IEPs in "Appendix A." A description of each of these notes (and *most* of the other notes in the NPRM) is included in the "discussion" under the Analysis of Comments (Attachment 1 to the final regulations). Column II, above, describes the primary action taken with each note (e.g., (1) "Added to Reg * * *" (or to Appendix A); (2) "In discussion under * * *;" or "Deleted.")

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